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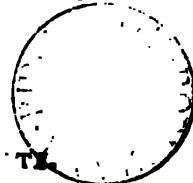
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;

COMMENCING WITH THE
JUDGMENTS
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Michaelmas Term 1798.

By CHR. ROBINSON, LL.D. ADVOCATE



VOLUME THE FIRST.

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1799.

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J U D G E
OF THE
HIGH COURT OF ADMIRALTY,
The Right Hon. Sir WILLIAM SCOTT.

Sir JOHN NICHOLL, King's Advocate.
WILLIAM BATTINE, LL.D. Advocate of the Admiralty.

ADVERTISEMENT.

IN adding to the very valuable collections of Reports, in the other Courts of Judicature, those of the High Court of Admiralty, during an interesting period of a long and complicated war; I am induced to hope, that I offer to the Public a Work of general utility, and, as such, not unacceptable to many readers.

The honour and interest of our own Country are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly proper to be known here at home, in what manner and upon what principles its Tribunals administer that species of law: and to foreign States and their subjects, whose commercial concerns are every day discussed and decided in those Courts, it is surely not less expedient that such information should be given.

With regard to the general fidelity of the work, I am proud to give the reader the security of knowing, that no means of accuracy and correctness, which the kindness of the most experienced of my profession could supply, have been denied to me. Of my own anxiety on this point I will only say, that I consider an inviolable adherence to the very terms of a judicial sentence, *as far as it can be attained*, to be the indispensable duty of a Reporter; and that I shall esteem it a great happiness, if any care and diligence

gence that I can use, may avail to correct the misrepresentations to which jurisdictions of this nature are, perhaps, peculiarly exposed.

To the gentlemen of my own Bar I have to return my best thanks for their ready and friendly communications: It is besides a duty I owe them, to state explicitly the rules by which I have been guided in exercising a discretion of some delicacy; in omitting, altogether, or inserting, in a compressed form, a statement of the arguments in the several cases. On proofs of property, and on questions of mere fact, I have usually omitted the arguments—retaining them only in general so far as any position of law, or any reference to authorities, or any general principle came into discussion; and so far as might serve to shew the points to which the attention of the Court was principally directed. Under these limitations, I must often run the risk of weakening the force of their observations by my own constrained manner of representing them; I must, therefore, beg their pardon for this liberty, as a public acknowledgment to them; and as an intimation to the Reader in what manner he is to consider *the statement of the argument* in these Reports.

CHR. ROBINSON.

DOCTORS COMMONS.

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R E P O R T S

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

¶c. ¶c. ¶c.

THE VIGILANTIA, GERRITZ Master.

Nov. 6th,
1798.

THIS was a case of a ship sailing under *Prussian* colors, and taken on a voyage from *Amsterdam* to *Greenland*, laden with stores and other necessary articles for the *Greenland* fishery.

A claim was given for Mr. *Brower* a merchant of *Emden*.

For the Captors, the King's Adv. and Arnold—This is one of a class of cases in which the *Dutch* have attempted to protect their fisheries, by transferring to neutral merchants the pretended property of their vessels. Every fact in the case suggests suspicion of fraud. The former owner continued to conduct the con-

An enemy's
vessel offensively
transferred and
continuing in
the enemy's
trade, is liable
to condemna-
tion.

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cerns of this vessel in the nominal character of agent: the former master continued in command: the ship continued in her former trade; and was destined ultimately on this voyage to the same port, that had been the constant port of her returns for twenty years. All the parties on whom the claim can rest for support are discredited by their own conduct. The magistrates of *Emden* have weakened the authority of their certificates by their facility in granting them. Mr. *Brower* has *forfeited* his claim to belief, by procuring from these magistrates a certificate of the master's residence, which the master himself contradicts: the master believes the whole to have been a fraudulent transaction; he suspects *all* the papers to have been colorable; and confesses the *master-roll* to be in his *own knowledge* false.

But, were the transfer real, the law of nations would not justify such a transaction: there are rights to be maintained by belligerent nations, as well as *interests* to be pursued by neutrals, and it cannot be required on any principle of justice, that powerful belligerents should concede to neutral nations a right to interpose and rescue from their hands, a principal branch of the commerce of their enemies, at the very moment, when it is about to fall a certain conquest to the superiority of their arms: on these grounds, as well *on defect of title as on principles of law*; and more strongly on both; this vessel is liable to immediate condemnation.

For the Claimant, *Lawrence and Swabey*—The argument for the captors has been directed more against the credit of individuals, than to the merits of the

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the case: with this view a forced and unnatural construction has been put upon some parts of the transaction. The magistrates of *Emden* have been implicated as parties, and charged with lending their countenance too lightly, when in truth they certify not their own conviction, nor even an opinion, but simply the facts that had taken place; and the particular proof that Mr. *Brower* had exhibited of his title before them. Their act was merely ministerial, exercised without an option, and without a bias to influence their conduct: through the whole of this war, neutrals have been allowed so far to avail themselves of the difficulties in which the commerce of belligerent nations becomes necessarily involved, as to purchase their ships: if the purchase of a *Dutch* vessel was free to Mr. *Brower*, the *Greenland* trade lay open to him in common with adventurers of all other nations: and if he resorted to *Holland* for a market, it was only because that country afforded a better price than could be obtained at *Emden* or *Hamburg*. The transaction therefore cannot be impeached on principles of public law. And as to the proofs of the facts of transfer, the most that can be objected on that point, is, that the depositions are in some respects contradictory to the ship's papers: but this objection is again weakened by the loose and inconsistent manner in which the master has made his depositions: these contradictions however, at the utmost constitute only one of those cases of doubt, in which it is peculiarly the practice of Courts of Admiralty to require further proof.

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Nov. 6th,
1798.

*
The
VIGILANTIA.
Nov. 6th,
1798.

CASES DETERMINED IN THE

JUDGMENT.

Sir *W. Scott*—This was a ship sailing under *Prussian* colors, and taken on the 4th of *May 1798*, on a voyage from *Amsterdam* to *Greenland*: there was no cargo on board, but the vessel was fitted out with stores necessary for the *Greenland* fishery. The claimant is *Mr. Peter Brower*, of *Emden*; and the cause comes on to be decided by me, on the only evidence that can regularly be produced in the first instance, on the ship's papers, and the preparatory examinations.

There have been three witnesses examined, the master, the mate, and another seaman; and as some remarks have been made on their credit, I must observe that every presumption is to be entertained, *a priori*, in favor of their evidence: they are persons, who have no interest that I can discover in the condemnation of this vessel; whatever interest they can have, must be on the other side: they must be concerned to defend their own employment and occupation in this commerce; and they have also the natural prepossession in favor of their employers; I cannot therefore but consider them as witnesses most favorable to the claimant. But the master in particular is said to be discredited, by the contradictions occurring in his evidence; he is represented to have said, “he knows no ‘thing of a bill of sale;” while another witness deposes, that “he told him there *was* a bill of sale:” now I cannot consider this to be a contradiction in any degree important: the master says, the ship had been sold, and therefore he cannot be understood to speak against *the existence of a bill of sale*. In swearing that he knows nothing of such an instrument, I consider him to say no more than that he knows not where it was executed,

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cuted, or by whom, or before whom, or upon what considerations; he means only to disclaim all particular and private knowledge of it. It is urged against him as another contradiction; that he says, "he had his instructions only from a person resident in *Holland*;" whilst there appear amongst the ship's papers, two sets of instructions expressly purporting to have been received from Mr. *Brower* of *Emden*. But these papers scarcely deserve the name of instructions; they are as general, vague, and formal papers as could possibly be executed; they leave every thing relative to the voyage to be filled up by others: in one of them, a letter from Mr. *Brower* bearing date *Feb. 1797*, Mr. *Brower* expresses a general intention of employing his vessel in the *Dutch Greenland* trade, and assigns his reasons for it, but mentions not a word of money, or of the course of supplies by which such a trade was to be carried on: the other is also a letter from Mr. *Brower*, but equally uninstructive, and therefore strongly confirms the master in that part of his evidence; in which he says, he was to resort to some other person for instructions: I shall therefore consider this person as by no means discredited by these instructions.

What then is the result of his evidence? He says, "he was born in *Holland*; that he had always been a subject of the *Batavian Republic*, but thinks from a paper which he received from *Emden*, that he is now a subject of the King of *Prussia*;" he acknowledges, "that he never was at *Emden*, nor ever took any oath of allegiance to the King of *Prussia*; he states, "that he was well acquainted with the ship now called the

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“ *Vigilantia*; that her name was formerly the *Young Peter*, but it had been changed about two years before he took possession of her at *Amsterdam*; that she had always been employed in the *Greenland* trade, and had constantly delivered her cargoes at *Amsterdam*; that *Jean Wart* was the owner; that *Wart* appointed him to the command, and fitted him out for the present voyage; that he sailed by the directions of *Wart* from *Amsterdam*, and was to have returned thither, and to have delivered his cargo to him; that he believes none of the papers are true and fair on board the ship, but knows the muster-roll to be false;” He says further, “ that a sale was made of this vessel two years ago by *Simeon G. Wart*; but that he believes the same to have been only a collusive sale, to conceal the true property; and that if restored she will, in his belief, belong to *Wart* and no other person.”— In this account he is confirmed by two other witnesses, assigning nearly the same reasons for the same belief.

So stands the case on the preparatory examinations; but there are papers on board which speak a very different language: these I shall now consider.—The ship must have been transferred in 1796; for the master was examined pretty early in the present year, and he says “ the sale was made two years ago;” but the earliest paper is dated *February 1797*.—It is the letter before mentioned, as containing instructions from *Mr. Brower* to this master. There is also a certificate of the same year in which the magistrates of *Emden* certify, “ that *Brower* had made oath before them, that the ship belonged to him as joint-owner,

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"owner, and that he had made proof of his property, by "what is called a legal bill of sale." These are the only papers of 1797. In 1798 there is the *Emden* passport granted to Mr. *Brower*: there is also a letter from *Brower* to the master, bearing date the 20th of Feb. 1798, with instructions to follow, *as fully as possible, his orders*. There is besides a certificate "that *Gerritz* is a fellow-inhabitant of *Emden*; he having "hired a lodging in that city:" and there is the lease of these premises demised to him from the 1st of *March* 1798 to the 1st of *March* 1799.

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Now undoubtedly between these two species of evidence, the depositions and the documents, there is a repugnance; and it is argued, that therefore the conviction of the Court must be kept in *equilibrio* till it can receive farther proof: I admit this is a general rule of the Court of Admiralty; but it is a rule by no means inflexible; it is liable to many exceptions; the exceptions may sometimes be in favor of depositions, and sometimes, though more rarely, on the side of the documentary evidence. A case *may* exist, in which the witnesses may appear to speak with such a manifest disregard to truth, that the Court may decide in favor of papers bearing upon them all the characters of fairness and veracity. On the other hand it may happen, and does more frequently happen, that the papers may betray such a taint and leaven of suspicion on the face of them, as will give a decided preponderancy to the testimony of the witnesses examined, especially if these witnesses give a natural account of the part they took in the transaction, and in a manner so distinct and clear, as to carry with it every degree of moral probability. The propriety of

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this practice will be best illustrated by an example:—Let us suppose the case of a ship furnished with documents, before there has arisen any apprehension of a war; there could then be no reason for the introduction of fraudulent papers: fraud is always inconvenient, and seldom adopted as a matter of choice:—under such circumstances there is no particular ground of suspicion against the documents.—But on the other side, suppose that there is a war, or the apprehension of a war, when the documents are composed: here in that decided, or in that doubtful state of things, they become subject to some suspicions *in limine*; which suspicion may be increased by their having passed through the enemy's hands.—The suspicions will be still further increased, if the property to which they relate has continued under the management and direction of the enemy. And if in addition to all this, they carry such contradictions or difficulties on the face of them as cannot be explained, admitting the matter to be a fair transaction; all or any of these circumstances must divest the papers of their natural credit:—let us see then how the papers in the present case will bear this test; they are papers composed during a war, *on the very spur of the occasion*: they purport, that a ship belonging to the enemy was *at that time transferred*; but it appears that the management of her concerns still continued in the hands of the former owner; that she sailed from a *Dutch* port, where she had been confined, for want of employment, with an intention of returning to that *Dutch* port, only; that the *Dutch* master continued in command, and the crew were picked up in the harbour of the enemy.—In a word,

word, there is no circumstance in the whole history of this vessel which connects her with any neutral ownership, excepting the single averment contained in them, *that there had been a transfer.*

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So much for the external credit of these papers, so far as it can be estimated from all the circumstances with which they are connected. I will now take a view of their internal character.—The first paper is a letter from *Brower* to the master, bearing date in 1797; it is said to be the proper beginning of the correspondence of an owner, and sets out with stating his intention of employing the vessel, and this man as master, in the *Greenland* trade;—and if this was the beginning of such a correspondence, we might naturally expect that it would have been followed by a chain of detailed and particular communications; but nothing like it—nothing follows; till in the next year there is another letter from the same person enjoining the master *to pursue his directions*; but *no directions are produced*; and the master positively swears, that he received no orders, except from the former *Dutch* owner.—Another paper, is, the muster-roll; and this is confessedly false; it states the mariners to be all neutrals, when in truth, by the master's own confession, fourteen of them were *Dutchmen*, picked up at *Amsterdam*.—This instrument then contains a representation that is false, and therefore in some degree lessens the credit of the other papers found on board.

There is another paper also, which I consider to be, in the same point of view, very material; it is the lease of the lodging at *Emden* to the master. In what proportion truth is mixed up in the composition of this document, appears from the confession of the master, who

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who swears that he never was at *Emden* in his life; that he never took the oath of allegiance to the King of *Prussia*; and that he had no knowledge of his pretended employer, Mr. *Brower*.—Connected with this last paper is another, of which I shall find some difficulty to express myself with entire propriety: it is a certificate of the national residence of the master, under the seal of the magistrate of *Emden*. Now meaning to speak with all the respect which is due to persons in public stations, I cannot but accede to the observation, that where a magistrate merely certifies, that another person has formally appeared before him, and has given such a representation of any fact, the falsehood of that representation finds no imputation against the magistrate who has granted such a certificate. But on the other hand, consider what that certificate is; the magistrates therein certify, “that the said *Jan Gerritz* is their fellow-inhabitant, he having hired a lodging at that place;” and they declare, “that they certify this at the request of the said *Jan Gerritz*.” Yet he himself positively swears, “that he has no acquaintance with any part of the *Prussian* dominions, and never was at *Emden* in his life.” Now in what manner or by what means this certificate has been procured, whether by imposition on the magistrates, or whether by some inaccuracy on the part of the magistrates themselves, it is impossible for me to conjecture; but I must add, that inconveniences from this kind of conduct may be likely to attach on the inhabitants of that city, if not prevented by those who have the public care of that place, in guarding against practices of such a nature. I should be extremely sorry to suppose that any body of magistrates acted in their

their public conduct with an insufficient sense of public duty, and of that guarded honor and integrity which belong to public situations, and without which, the intercourse of mankind in different states cannot conveniently be supported; and I therefore only desire that it may be intimated to the magistrates of *Emden*, that there is a danger of a surprise on their vigilance in these matters; and that it concerns the public interests of that place, to have that vigilance more laboriously exerted against impositions of this sort—impositions which I must conceive to have been practised upon them: because on any other supposition, undoubtedly I should be under the necessity of expressing myself, with less civility, than the relation which I bear to the magistrates of other countries would induce me to do. Looking then at these papers, and the conduct of the parties, I feel no scruple in pronouncing, that this ship still continues *de facto* the property of the former *Dutch* owner; and is, as such, subject to condemnation.

But I will go farther; and for the convenience of applying a ruling principle to some other cases which I am informed bear a strong affinity to the circumstances of the present case, I will express my opinion on the abstract question of law. I desire to state my opinion then, subject to the correction of a superior court, that supposing Mr. *Brower* to be the actual proprietor of this vessel, and resident at *Emden*, yet this vessel and her concerns (however it may be with respect to other ships, and other concerns in which this gentleman may be engaged) are liable to be treated and considered as *Dutch* property.—In the first place she is a *Dutch*-built vessel, a *Dutch* fishing vessel, that went

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went from *Amsterdam*, regularly, and habitually, to *Greenland*, and to return to *Amsterdam*, there to deliver her cargo: she is purchased in *Holland*; she is purchased avowedly for the purpose of pursuing the same course of commerce, the fishing trade of *Holland*: she is purchased at a time when, it is said, there was a defect of conveniences for carrying on this trade at *Emden*; but I am satisfied it was the intention of the parties to carry on this trade to and from *Amsterdam*. Now, I ask upon what grounds is it, that this vessel, so purchased and so employed, is to be considered merely as a *Prussian* vessel? Here is a ship as thoroughly engaged and incorporated in *Dutch* commerce as a ship can possibly be; she is fitted out uniformly from *Amsterdam*; she is fitted out with *Dutch* manufacture, she is fitted out for *Dutch* importation, in all these respects employing and feeding the industry of that country; she is managed by a *Dutch* ship's husband, and finding occupation for the commercial knowledge and industry of the subjects of that country; she is commanded by a *Dutch* captain; she is manned by a *Dutch* crew, and brings back the produce of her voyage, for the purpose of *Dutch* consumption and *Dutch* revenue.—If to this you add, that the vessel is transferred by the *Dutch*, because they themselves are unable to carry on the trade avowedly in their own persons: it is truly a *Dutch* commerce in a very eminent degree, not only in its essence, but for the very hostile purpose of rescuing and protecting the *Dutch*, from the naval superiority of their *British* enemy. In my apprehension, unless it could be maintained as a rule, without any exception whatever, that the domicil of the proprietor constitutes the

national character of the vessel : this ship must be condemned, even if she had been really transferred.

Now on that point, I conceive the rule to be, that where there is nothing *particular or special in the conduct of the vessel* itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct, which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails : she makes a part of it's navigation, and is in every respect liable to be considered as a vessel of that country. In like manner, and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and *evidently on account of the war*, on what ground is it to be asserted, that vessel is not to be deemed a ship of the country from which she is so navigating ; in the same manner as if she evidently belonged to the inhabitants of it ?

Suppose the naval arms of *France* had been triumphant in her present contest with *Great Britain* ; and that all the *British Greenland* ships could no longer have been navigated as such from *British* ports ;—suppose a neutral country should offer her charitable assistance, and her merchants should say, we will purchase your vessels, but they shall still navigate to *Greenland* ; they shall still continue under your management, and be fitted out in your ports ; they shall still contribute to the industry of your artificers ; they

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they shall be conducted by the skill of your own navigators, by the attention of your merchants, and they shall supply your manufactures and revenue: in my apprehension the enemy would be justified in saying, "you the neutrals are in this transaction mere merchants of *Great Britain*, your traffic is the traffic of *Englishmen*; with respect to this commerce it has all the marks of *English* commerce upon it, and as *English* commerce it shall be considered and treated by us." But, farther, in considering this case as the case of a *Dutch* ship, I think I am strongly warranted from higher authority, by the judgment of the Lords of Appeal in a case which is well known in this court, the case of *Zacharia Coopman and Co.*

The Nancy,
Liberty, Essex,
&c. Lords, April 9, 1798.

Hazan and
Earnest,
The Jacobus
Johannes,
Miller; Lords,
Feb. 10, 1785.

There had been a determination *last* war, in the case of two persons, one resident at *Saint Eustatius*, the other in *Denmark*, who were partners in a house of trade at *Saint Eustatius*—The one who resided there, forwarded the cargoes to *Europe*; the other received them in *Amsterdam*, disposed of them there, and then returned to *Denmark*. It was decided in that case, that the share of the person resident in *Saint Eustatius* was liable to condemnation, as the property of a domiciled *Dutchman*; and that the share of the other partner should be restored, as the property of a neutral. There was also a case in this war, of some persons, who migrated from *Nantucket* to *France*, and there carried on a fishery very beneficial to the *French*; in that case, the property of a partner domiciled in *France* was condemned; whilst the property of another partner resident in *America* was restored. From these two cases a notion had been adopted,

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adopted, that the domicil of the parties was *that alone*, to which the Court had a right to resort; but the case of *Coopman* was lately decided on very different principles. It was then said by the Lords, that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation; but it was then expressly laid down, that if a person entered into a house of trade in the enemy's country in time of war; or continued that connexion during the war; he should not protect himself by mere residence in a neutral country. That decision instructs me in this *doctrine*, a *doctrine* supported by strong principles of equity and propriety; "*that there is a traffic which stamps a national character on the individual, independent of that character, which mere personal residence may give him.*" In the present case I am clearly of opinion, that this is altogether a *Dutch* traffic; and that a ship, so employed as this ship appears to have been, is in every respect to be considered as a vessel of that country; in whose navigation, under all these circumstances, she was habitually employed. This is a determination which I shall certainly apply to the decision of all those cases which come before me under similar circumstances. If my opinion is erroneous, I am happy to think it will be set right by a much higher authority; but I feel no diffidence in the decision which I have now pronounced.

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A master's na-
tional charac-
ter is taken
from his em-
ployment.

THE EMBDEN, MEYER Master.

THIS was a case of a ship transferred in *Holland* under circumstances similar to the preceding case, and taken on a voyage from *Amsterdam* to *Greenland*.

A claim was given for Mr. *Bowerman* of *Emden*.

For the Claimant, Lawrence and Swabey—This case is distinguishable from the last in these points: The master is a *Prussian* by birth; he verifies and confirms the account of his papers; and believes *Bowerman* to be the owner.—It appears also from a letter on board, that there was in these parties an intention of removing the ship, and her trade, to *Emden*, the owner's port, as soon as the necessary works could be established there. This intention proves the truth and reality of the transfer; and at the same time destroys all those arguments that, in the case of the *Vigilantia*, were drawn from the continuance of that vessel in the *Dutch* trade.

For the Captors, the King's Advocate—These distinctions are immaterial; the fate of the ship must depend on her actual employment rather than on the vague and remote intentions of the pretended owner; the sincerity of these intentions is besides very much discredited by directions which appear to have been given, that this vessel should under all events return to *Amsterdam*: as, in case of an unsuccessful voyage, it is said, “the pretended owner ‘had formed a design of selling her again.’”

JUDG-

JUDGMENT.

Sir *W. Scott*—The question which I am to consider is, whether the distinctions which have been pointed out, are sufficient to take this vessel out of the law which has been laid down in the preceding case?

The first distinction is taken from the master's national character; but I think he has scarcely a right to be considered as a *Prussian* subject; he is a single man who has established no domicil by family connections; and in his own person he has been employed constantly for ten years in trading from *Amsterdam* to *Greenland*: by such an occupation he is divested of his national character, and becomes, by adoption, a perfect *Dutchman*.

That there has been a transfer of some kind is not denied; but yet the master can go no farther than to assert *a belief only* that the ship is the property of *Bowerman*; and because the persons employed about her in *Holland* told him so: it is indeed strange that persons making these purchases in an enemy's country, should act with so little caution, as not to make the master so far acquainted with the transaction, if it is a fair one, as to enable him to corroborate and verify his papers from a real knowledge; and it is scarcely reasonable to expect that we, sitting here to examine their title, should give full credit to a claim which their own master cannot confirm farther than by a cautious belief. The defects in this case are not merely simple omissions, but go to the very substance of the transaction; the master cannot verify; the second witness is in the same state of ignorance; but the third actually asserts his belief that the ship is the property of *Hackman*, the person from whom the master allows he received all his papers.

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Amongst the documents there is no bill of sale, nor even a copy exhibited; and the papers which do appear are exposed to the same observations that I was compelled to make on the documents of the preceding case. There is a certificate of the master's residence at *Embden*, procured by *Bowerman*, but contradicted by the master's own confession; for he states, “*that he never was at Embden: and that he is totally unacquainted with Mr. Bowerman, his pretended employer.*”

On the other side it is said, there are instructions which sufficiently remove the imputation of a continued, habitual occupation in the *Dutch* trade: it is to be observed, however, that the truth of these instructions is not a little impeached by the false certificate, which the writer, Mr. *Bowerman*, is allowed to have put on board, respecting the residence of the master; but if this objection was removed, what proof would they afford? The master received them by the post; they are dated *Embden*, yet the master will not venture to say from what place they came; the contents discredit them, as they give only a barren order to go to the fishing parts, to stay there the usual time, and then to return. As a letter from a real owner to a confidential agent, the master of his vessel, nothing could be less instructive. This letter farther states, the intentions of the owner to remove his trade to *Embden* in the ensuing year, when proper accommodations could be prepared. But I have observed in the last case, these speculations on the *Dutch* fishery had been commenced two years at this time, and as to the intimation contained in this letter, that in the next year this trade would be particularly privileged by the King, it is no excuse, if true, for the

the intermediate continuance in the *Dutch* trade, and does in no degree apply to the present actual employment of this vessel.

It is, besides, a little inconsistent with the sanguine expectations entertained of the privileges which this trade was to receive at *Emden* in the ensuing year, that the projector of these schemes should resolve to sell his ship again immediately, if she should prove unsuccessful in her first voyage.

I have this fact then against the future intention of the claimant: The ship still continued in the *Dutch* trade; the former master continued to command; the return was to be under all events to *Amsterdam*; the defects of proof are not, as I have said, simple omissions only, but fatal imperfections; they are inconsistent with any idea of a fair transaction. I am unable to distinguish this case from the circumstances of the preceding case, and therefore under the same principles, I must pronounce this vessel subject to condemnation.

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THE ENDRAUGHT, BROETJAS Master.

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1798.

THIS was a case of a *Dutch* ship under circumstances similar to the last case, but claimed by a merchant of *Oldenburg*.

For the Claimant, Lawrence—A material distinction arises in this case, from the residence of the owner.

C 2

Oldenburg

Where a ship is transferred from an enemy and continues habitually in the enemy's trade, the neutral is not specially entitled to carry on that trade, merely because his own country has no sea port.

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—
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Oldenburg has no port to which the vessel could return as to her home; the owner was under the necessity of using some foreign port, and therefore a return to *Holland* cannot in this instance afford an inference to impeach the fairness of the transaction.

JUDGMENT.

Sir *W. Scott*—I think this case comes under the range of the principles which I have laid down. If the claimant from views of interest chose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation. Though he had no sea port of his own, the ports of other neutral countries were open to him; and if he confines his vessel exclusively to the enemy's navigation, he is liable to be considered as an enemy with respect to the concerns of such a vessel.

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1798.

THE YOUNG JACOB AND JOHANNA,
VISSER Master.

Forbearance towards common fishing boats has been a matter of *comity* in former wars. In this they have been proceeded against, and condemned.

THIS was the case of a small fishing vessel taken on her return from the *Dogger Bank* to *Holland*.

JUDGMENT.

Sir *W. Scott*—In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule (*a*) of *comity* only, and not of legal

(a) This has been an indulgence of ancient date: the *French* Ordinance of the year 1543, gave the Admiral a power of forming fishing truces, *trêves pêcheuses*, with the enemy during hostilities; or of granting passports to individuals, to continue their

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legal decision ; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment ; and as they are brought before me for my judgment, they must be referred to the general principles of this Court ; they fall under the character and description of the last class of cases ; that is, of ships constantly and exclusively employed in the enemy's trade.

But it has been argued in distinction, that vessels of this kind have no decisive character arising from destination, or from the port of their return ; they come, it is said, frequently to this country, and resort indifferently to any port that will afford them a market. When a case shall occur of a vessel so destined, occasionally, to the ports of this country, it will be time enough to consider by what rule it is to be governed ; but all the facts of this case point so entirely to *Holland*, that I have no hesitation in pronouncing, that it falls under the authority of the principles which I have laid down in the late class ; and is therefore subject to condemnation.

It is a farther satisfaction to me, in giving this judgment, to observe, that the facts also bear strong marks of a false and fraudulent transaction.

their fishing trade unmolested ; this practice prevailed so late as the time of *Louis the XIVth*. They have since fallen into disuse " owing to the ill faith with which they were observed " *by the enemies of France.*" *Valin, liv. 5. tit. 1.*

Valin speaks of them as exceptions of *comity* only, " *en derogant en cette partie au droit de la guerre suivant lequel les Pêcheurs sont de bonne prise comme les autres navigateurs.*"

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1798.

A Dutch ship
offensively trans-
ferred to a neu-
tral, condemned.
A description of
contraband, and
exceptions, un-
der the *Danish*
treaty.

THE ENDRAUGHT, BONKER Master.

THIS was a case of a ship taken on her voyage from *Narva* to *Dort*, in *Holland*; with a cargo of balks, fir-planks, battens, and firewood.

A claim was given for the ship and cargo, as the property of *Danish* subjects.

For the Captors, The King's Advocate—In respect to the ship, this case must turn chiefly on the facts of a transfer: and on a reference to those principles which have been laid down, respecting the purchase of enemy's vessels, and their continuance in the enemy's trade: it is allowed, this vessel has been the property of a *Dutchman*, and is said to have been by him transferred to the claimant.

A bill of sale has been produced; but this document is discredited by the master's evidence, who says, "he believes it to be collusive, and executed "only for the purpose of covering the property:" the ship had never been removed from *Dutch* commerce, and her return on this voyage was to have been to *Holland*. With respect to the cargo, that is clearly confiscable, under the *Danish* treaty (a); by that treaty it is declared, "all articles which serve directly "for the building of ships, unwrought iron and "fir-planks excepted, shall be deemed contraband:" The balks therefore being squared firs, not sawed into planks, and applicable to ship-building, do not come under that exception, and are to be considered as contraband: for it is not necessary to bring timber under the terms of that treaty, that it should be

(a) Additional article between Great Britain and Denmark, July 4, 1789, explanatory of Treaty 1670.

be so peculiarly adapted to the purposes of ship-building, as not to be applicable also to other uses.

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For the Claimant, Lawrence—There are many points of distinction in favor of this ship; she is not *Dutch* built; the master is not a *Dutchman*; the mariners are none of them *Dutchmen*; the pass in this case was granted for a voyage to *Hamburg* and *Amsterdam*; and therefore there was no pretence to say this vessel has been continued invariably in *Dutch* commerce: amongst the documents there is a bill of sale particularly full and specific; and although the master attempts to discredit it in his evidence, he can assign no reasons for his opinion, and therefore a bare unsupported suspicion is not evidence that ought to be received.

With respect to the cargo; the construction which has been put upon the *Danish* treaty is an interpretation perfectly new; the words “*directly serve*” were intended to describe accurately such timber as is in its nature more particularly applicable to the uses of ship-building: it would indeed be difficult to find any wood that might not be useful for some inferior purposes of ship-building; but by this term was meant specifically such timber as is most generally employed for that purpose.—These balks are of the length of only 30 feet, and out of 2 or 3000 there are only fifty of the length of 50 feet. No precedent has been cited, in which balks of such dimensions have fallen under this construction; whilst on the other side, some instances have occurred in which such timber has been restored, after a reference as to its use to the judgment of persons employed in our navy yards.

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JUDGMENT.

Sir *W. Scott*—The question which I am to determine is, not whether this case is in all its circumstances exactly similar to former cases, but whether in the leading points there are any characteristic marks, on which I can form a belief that this vessel is not *Dutch* property.

The course of her trade is from a *Dutch* port and back again to *Holland*; the crew, whether *Dutch* or not, were all picked up in a *Dutch* port; the master I must consider as a *Dutchman*, for although he was by birth a *Dane*, and although he may have a wife and family resident in a neutral country, yet his own personal occupation has always been in *Dutch* trade; and therefore, under the general rule that mariners are to be characterized by the country in whose service they are employed, I must consider him as a *Dutchman*.

Besides, it is observable that he has never held any correspondence with *Emden*, but only with persons at *Amsterdam*: although there is a certificate of his domicil at *Emden*, there is no proof that he ever lived there *a day*; and, from the course of his employment, I think I may conclude he in fact *never* was there.

Is it a nominal residence then, that can entitle him to be considered as a citizen of *Emden*, under the magistrate's certificate only? Surely the magistrates themselves will not expect me to be satisfied with this sort of proof. The residence which the Court requires, must be taken up *bona fide*, with a *bona fide* intention of making it the place of habitation: without such an *actual*

actual residence, a certificate like this rather weakens than assists the case.

There is also, it is said, a bill of sale, but it is entirely unsupported, and is only a part of the machinery of the drama; the master himself confesses, he believes the ship to be *Dutch* property; but it is said, he has no grounds for this belief: in my opinion the whole of the transaction and every fact in the case strongly supports this belief: I consider the master's deposition to be confirmed by the other evidence; and I condemn the ship as *Dutch* property.

With respect to the cargo, on the Question of Property, I should require farther proof; and I must observe, on one of the papers, which is a certificate on the oath of the shipper, that the Court can never admit such *a priori certificates* to be any proof of the real property.

But there is a preliminary question which may make this discussion of property unnecessary; the nature of the cargo may perhaps decide this case: it is asserted to be "a cargo of ship timber going to "an enemy's port of naval equipment;" and under this description to come under the character of contraband. This I consider to be the correct law of nations, notwithstanding some relaxations which may occasionally have been allowed.

But besides the general law of nations, there is an express treaty between this country and *Denmark*: which declares, "that ship timber, fir planks excepted, shall be deemed contraband."—With respect to the true character of this timber, and the fair application of it, I do not seem to be in possession of sufficient

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facts to govern my decision ; I shall therefore refer it to the principal persons employed in making repairs for ships or vessels belonging to government at *Yarmouth*, where this cargo lies, to certify their opinion, whether this is properly ship timber ; if there are no such persons at *Yarmouth*, the opinions of respectable shipwrights there must be taken upon it ; and the Court will judge upon their report of its nature and quality.

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1798.

THE STAADT EMBDEN, JACOBS Master.

A Prize ship carried by the French into Norway, there ostensibly sold to a neutral: adjudged *on facts* not to have become the property of the neutral : masts are contraband ; —Contraband articles affect innocent parts of the cargo belonging to the same person.

THIS was a case of a ship which had been a prize ship taken from the *English*, and carried into *Christiansund*. A pretended sale had passed there, and the vessel was retaken on a voyage from *Riga* to *Amsterdam*, laden with deals and masts.

A claim was given for the ship, as the property of Mr. *Bowerman* of *Emden* ; and for the cargo, as the property of merchants of *Riga*.

For the Captor, the King's Advocate and Croke—The property of the former *British* owner has never been divested. The transfer, which is pretended to have passed, appears false and fictitious under the particular facts of this case ; but even on principles of law it is null and void ; as the transfer of a prize vessel carried into a neutral port, and sold without a condemnation or the authority of any judicial proceedings.—But, were

were it necessary to discuss the facts, the fraudulent nature of the transfer would sufficiently appear from this circumstance, that the sale passed under the direction of the *Batavian* consul at *Christianlund*; and the payment was made by bills drawn on *Zuirmuller*, the person to whom the capturing privateer belonged.

The Court—That circumstance is decisive; I shall trouble you no farther on the ship.

With respect to the cargo, it was argued, It consists of naval stores, bound to an enemy's port of naval equipment; and comes therefore under the character of contraband.

For the Claimant of the cargo, Arnold—This cargo is at most but of a mixed description, the deals must at any rate be separated from the masts: but, since the modern practice has relaxed the ancient law, and allowed merchants to traffic with the produce of their own country, although serving for purposes of war, the whole of this cargo is free; for the articles were all of the produce of *Russia*, and shipped by *Russian* merchants, for their own account. On this point there is the authority of a case decided in the last war; in which an attempt was made to confiscate some hemp, the cargo of a *Dutch* ship, and claimed as the property of a *Prussian* subject; it was there contended, that in order to entitle them to the indulgence of the relaxation, neutrals must make these exports only in vessels of *their own country*: the hemp was restored however; and that restitution, on appeal, was afterwards confirmed.

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Pieter; Lord;
April 24, 1783.

The

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The King's Advocate replied—No distinction can be made between the articles of this case, because they are all the property of the same claimant: for, although contraband articles may not effect other innocent articles the property of a different owner, it contaminates every part of the cargo belonging to the same person, and makes it subject to confiscation.

The case which has been cited on the other side, goes by no means to the whole extent of this case; because there the vessel was neutral; and in this case it would be necessary to maintain, that a neutral may load contraband articles, if they are the produce of his own country, on board an enemy's vessel; and send them even to a naval arsenal of the enemy, without molestation.

JUDGMENT.

Sir W. Scott—This is a *British* vessel, carried as prize by the enemy to *Norway*, and purchased, as it was pretended, on behalf of *Mr. Bowerman*.

If we look to the origin of the transaction, and trace the steps of it, it will appear, I think, that this vessel still continues the property of *Zuirmuller*, the owner of the *French* privateer.

The master says, “ that he was sent by *Zuirmuller* “ from *Amsterdam* to *Bowerman*; ” *Zuirmuller* therefore is the first mover in this affair. The master says farther, “ that he afterwards went on to “ *Christiansund*, with a commission to purchase this “ vessel, and draw for payment on *Zuirmuller*; and “ that he cannot swear, he believes such purchase to “ have been *truly* made: ” I think I can see in these half

half expressions a very full confession of his belief that it was a fraudulent transaction, especially as we find the other witness deposing, that *they* had heard the master say “ *Zuirmuller* was the owner.” This seems to have been the general understanding.

It does not appear that the vessel ever went into the management of *Bowerman*; his claim therefore must be rejected; but the ship must be sold, and after payment of one-eighth of the proceeds for salvage, seven-eighths must be brought into the Court, there to abide the event of any claim which may be given within a year, by persons asserting themselves to be the former *British* owners.

With respect to the cargo, there is no sufficient proof that it belongs to the *Russians*, for whom it is claimed; but if it did, it is contended to be of the nature of contraband; and most clearly the masters are liable to be so considered, in the judgment even of the most zealous advocates of neutral commerce. As to the relaxation in favour of the export of native produce, said to have been sanctioned by a determination upon *Prussian* hemp, in the case of *Jonge Pieter*, I am by no means disposed to consider that case as laying down any such universal principle.

There have been many cases in which native articles going to the enemy's ports on the account of inhabitants of the country which produced them, have been treated as contraband. In the famous case of the *Med Good's Help Soderberg*, a cargo of pitch and tar, going on *Swedish* account from *Stockholm* to *Port Louis*, was condemned; that condemnation was afterwards confirmed by a solemn judgment of the

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30, 1750.

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Lords, and the ms. note which I have of that case, expressly states it to have been condemned by the Lords of Appeal, on the ground of contraband.

It certainly does not aid the *Russian* claimant in this case, that the cargo is going to a country against which his sovereign is exercising hostility: that *Russia* is in a state of war with *Holland*, is more than I can venture to assert, no declaration to that effect having formally announced it; and therefore, if this was a cargo of a perfectly inoffensive nature, on the account of a *Russian*, it might perhaps be too much for this Court to confiscate it upon the ground of a trading with the enemy of his sovereign: at the same time it is to be remarked, that *Russia* is the declared public enemy of the *French* Republic, the patroness and ally of the present government of *Holland*; that the fleet of *Russia* is immediately co-operating with the fleet of *Great Britain* in the blockade of *Amsterdam*; and, though an auxiliary fleet is not of itself sufficient to make its government a principal in a war, yet where captures are made and prizes are claimed by that auxiliary force, as taken from a common enemy, which has been repeatedly done in the present *Dutch* hostilities, it is not easy to discover the grounds on which the government to which the auxiliary fleet belongs can be considered as entirely neutral.

Adverting therefore to all circumstances, considering that this is a shipment of naval stores to a port of naval equipment under possession of the *French*, and that *Russia* is engaged in declared hostilities against *France*, I shall condemn this cargo as contraband, and I shall make

make no distinction.—The statement of the King's Advocate is in my opinion the law of nations, upon this point.—To escape from the contagion of contraband: the innocent articles must be the property of a different owner (a).

I shall therefore condemn *the whole* cargo.

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(a) *Bynkerhoek*, through the whole of his 12th chapter, strongly vindicates this principle, “ *Sed omnino distinguendum putem, an licitæ et illicitæ merces ad eundem dominum pertineant, an ad diversos, si ad eundem omnes recte publicabuntur, ob continentiam delicti.*” — *Bynk. Q. J. Pub. b. 1. c. 12.*

THE MAGNUS, SORENSEN Master.

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THIS was a case of a ship laden with coffee and sugars, and taken on a voyage from *Havre* to *Genoa*.—The ship had been restored as *Danish* property, and the cargo had been referred to farther proof by *plea and proof*; on a claim given for Mr. *D. Merian*, a merchant of *Basle* in *Switzerland*.

JUDGMENT.

Sir *W. Scott*—This is the case of a neutral ship destined from *Havre* to *Genoa*. The principal question arising in it, respects the property of the cargo—whether it is to be considered as belonging to the claimant *Marian*, or to some persons resident in *France*.

The account which the master gives of his knowledge of the transaction, goes a very little way: he says, “ his ship was chartered by a person living in *France*, who told him, he took it up for the service
“ of

Switzerland and interior countries are allowed to export and import through an enemy's ports: but strict proof of property is required:—In doubtful cases, orders and the mode of payment are points necessary to be proved.

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" of a *Swiss* merchant: but more than this he knows " nothing of the matter." The variation between *Abel* and *D. Merian*, which the master made in filling up the bill of lading, is, I think, not sufficiently explained.

This was the state of the case on the first hearing; and it was highly reasonable to require farther proof of some sort or other: the order which has been made, has given each party an opportunity of stating his case in a distinct allegation, and has called on him to support it by the best proof the nature of his case can afford.

Perhaps it would not be going too far to say, that in *Swiss* cases it would not be unreasonable to require proof rather of a stricter nature than what is usually deemed sufficient in ordinary cases between maritime nations: and I say this only in reference to the situation in which the *Swiss* stand, in being obliged to trade chiefly through other countries, and often, as in this case, through the ports of the enemy. The privilege of carrying on trade in this manner, in time of war, has been allowed to them in common with some of the interior countries of *Germany*, in consideration of the hardship that they would sustain, were they to be altogether restricted from becoming merchants, for the supply of their own wants, or for the export of the manufactures and native produce of their own country.

But neither of these instances will extend to support the pretensions of this claimant.—He has gone much farther, he has been trading in articles of *France*, without a reference to any wants of his own country; and he appears here only in the character of

of a general merchant interposing to carry on the trade between *France* and *Genoa* with security.

I will not however at present make this a question, nor say how far in a fair transaction a *Swiss* might be allowed to stand in the place of a *French* merchant, and trade in this manner; it might, I think, be attended with some difficulty to establish such a privilege, but at present I will suppose it to be allowable; it must however on all sides be conceded, that on the fairest terms, such a trade would be exposed to great suspicion; and therefore we may be justified in requiring more than ordinary proof.

In this case, the proof that was required was of the most solemn nature, by plea and proof; but I will suppose it had been ordered only in general terms; even then what sort of proof should we have expected? Not merely a *test affidavit*; considering the distressed state of the trade of *France*, and the shifts to which the *French* were reduced to carry it on, we could not have been satisfied with bare attestations; the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the Court would have looked for satisfaction.

In this case therefore, where proof of a more solemn nature had been ordered, it could not be expected that less than ordinary proof would be received: plea and proof is an awakening thing—it admonishes the parties of the difficulties of their situation, and calls for all the proof that their case can supply. They should have proved the orders and the payment; these might have been sufficient; without these, all proofs of a

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secondary nature must fail to give that satisfaction which the Court is entitled to demand.

Nor can the parties themselves think us unreasonable: aware of the justice of these expectations, they have framed the first article of their plea to give this information: it is pleaded, "that *Girarde* purchased on "commission for *Merian*," but not a word of evidence is produced to support this assertion; nor is the defect in this material article in any degree counterbalanced by proof on the next great point,—the mode of payment. Payment to *Girarde* is not even alleged; but the explanation is, that payment was made by bills, partly on a *French* house, and partly on *Merian*; but when this point is still farther investigated, when, it is asked, were these bills paid? all the answer that we can obtain is merely argumentative; "they must," say the witnesses, "have been paid, or the goods "would not have been sent." In the same evasive strain are our inquiries answered on the former point; when it is asked, "did *Girarde* purchase these goods "for *Merian*?"—“Yes,” say the witnesses, “as we “have seen by the books and writings;” but where are these books? and what are these writings that they cannot be produced? The correspondence between *Merian* and *D'Orange* is freely exhibited; but not a word appears of all the letters that must have passed between *Merian* and *Girarde*.—*D'Orange*, through the whole of the transaction, appears but as a middle man.—The case, even if most fraudulent, would have supplied this sort of proof, and must have run nearly in the same course.

Indeed the defects in this case are exactly similar to those that occurred in *The Active, Blair*; a suspicion in

in that case arose, that Mr. *Brown* the claimant, was but an instrument to convey the produce of the *French* colonies to *France*. Much evidence was produced, but it never reached the origin of the transaction: the fact of purchase was never proved; and in that case the defect was deemed fatal and conclusive.

But it is said in this case, the defect arises from the forms of our proceedings, from those rules of practice which refuse a requisition to examine witnesses in *France*.

This excuse would indeed be entitled to much attention, were it a point capable of no other proof than the testimony of *Girarde*; but there must have been documents also to this effect in the possession of the claimant: "he is dead," it is said—but his books survive, and it is not pretended that they are destroyed. If the transaction therefore was ever bottomed in truth, as an adventure of considerable value, it must have been attended with all the forms of mercantile proceedings; it must have appeared in *Merian's* books. Till some account is given of these, it can be no cause of complaint that we do not permit a party to resort to *France*; for that proof which his own counting-house ought to supply.

Thus stands the case on defect of evidence; and condemnation, it is urged, must necessarily ensue.— Total defect of evidence is certainly, on the general rule, a legal ground of condemnation, especially where the party has been indulged with the opportunity of supplying the defect. But it is always a painful thing to the Court to decide on mere defects;

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they arise sometimes from ignorance, from negligence often, or perhaps from accident.

On mere defect, it would have been with great pain that I should have proceeded to condemn so considerable a mass of property as is involved in these causes ; it would relieve me from this anxiety, to find also in addition to these defects, some affirmative proofs of fraud; I have therefore looked into the case with this view, and I think it is a case which will afford me that satisfaction. Mr. *Merian* appears to have been a very young man, not established in any house of trade till the commencement of the present war in 1793 ; he appears also to have been frequently in *France* : he must have had opportunities therefore of becoming acquainted with the distresses of *French* merchants, and their want of some such assistance as *bis*, to screen their trade. The extent of Mr. *Merian*'s mercantile engagements must have been very great ; yet it is said, as an excuse for producing no more witnesses, that he had but one clerk : and that this person cannot now be found : his books, however, as I have before observed, if indeed there were any books, must have been preserved : there is besides no trace of any insurance. All these suspicious circumstances fairly justify me in looking to a former case, in which something has appeared respecting this gentleman. In the case of *The Molly* before the Lords of Appeal (a), there was exhibited a certificate of *Abel Merian* the father, in which he swore, "the property of the cargo in question belonged to his son :" in this case the same gentleman swears, "he knows nothing of the mercantile transactions of his son."

Thus

(a) Nov. 21,
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Thus stands the whole case. On a view of all these symptoms of fraud, in addition to defects of evidence, I think I should be fully justified in pronouncing it subject to condemnation : I should still, however, feel reluctant to condemn so large a property, if I thought there were any means of obtaining farther information ; but I fear there are none.

If the experience of the Counsel can furnish any instance in which a second reference has been made for farther proof, after the cause had undergone a trial of this nature by plea and proof, I should be glad to be informed of it : if the Lords of Appeal think they can go beyond the forms of this Court, and admit farther proof, I cannot say I should regret it ; but I fear I cannot make such a deviation from the established rules of practice.

Condemnation—but suspended to search for precedents on this point : *Dec. 3.*—condemnation final, no precedents being produced.

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THE AQUILA, LUNSDEN Master.

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THIS was a case of a ship and cargo found derelict at sea : the destination appear to have been from *Cadiz* ostensibly to *Hamburg* ; but in fact, as there was great reason to believe, to *Amsterdam* : the ship had been restored as *Swedish* property : the cargo had been condemned as unclaimed.

The cause now came on upon a reserved point, respecting the title to the condemned goods ; and the proportional merits of different salvors.

The rate of salvage on derelict is in the discretion of the Court : the ancient rule of granting a moiety *de jure* to the finder has been overruled by the practice of the century.

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For the original Finders, Laurence and Swabey—
The original finders in this case are not to be considered strictly under the character of salvors: that term applies in common acceptation to cases of a very different description. In cases of salvage there is no dereliction of property: salvage consists in assistance given to friends, or in rescue made from an enemy, actually in possession: this case falls more properly under the principles of general law, and more especially under those rules of the civil law, by which a title in such things as are *bona vacantia*, is acquired by the occupancy of the first finder. It appears, however, that under the ancient practice of this Court, and as it is submitted, under the true rule of this country, goods found derelict at sea, have been divided by moieties, between the finder and the crown: this practice is supported by very ancient authority. Inquisition taken at Queenborough, anno 1375, 2d April, 45 Edward III. with additional articles entered in the Black Book of the Admiralty, No. D. Art. 23(a) and 74(b). Also another ancient inquisition translated by Rowghton into Latin. These records seem to establish a moiety of the thing recovered to be of right due to the finder, and forfeited only by concealment.

(a) " Item : soit enquis de toutes nefs, vesseaux, ou bateaux
" qui sont trouvez waif sur la mer, dont l'Admiral n'a eu sa part
" à lui due d'office, c'est à dire, la moitié."

(b) " Item : pour prendre duement et receyver ce que de droit
" appartient à l'Admiral, de flottesyn, wayf, deodant, getesyn,
" & wreck de mer ; cestassavoir la moitié, et l'autre moitié à
" regard d'icelles au trouveurs, pour leur travail."

forms

The more ancient forms of practice in the Registrar's Book recognise this share also as a matter of right. After condemnation to the crown, a monition issued against all persons in whose possession the goods remained, "to bring the same into the Registry, that "they might be divided according to law between "the finder and the crown: ad effectum ut inter "Dominum nostrum Regem et eadem huic Curiæ "presentantes juxta jura dividantur: et si forsan "aliquis vel aliqui vendiderunt vel vendidit eorum "aliqua, tunc ad introducendum *medianam partem* pro- "ventus, ad usum dicti Domini Regis."

At what time this form ceased to be used, or whether the ancient practice was over-ruled on argument or not, nowhere appears; but notwithstanding an alteration may have taken place in the forms of the Court, and the proportion of a moiety may not in later times have been decreed *de jure*; it has still continued to be the favoured proportion, and the exceptions to it have been but very few. With respect to the second claimants, they can have no claim as finders; they cannot pretend to be considered as salvors: whatever remuneration they may deserve, it must be given to them in the nature of payment for labour and service; they cannot participate in the higher claims, which, it is submitted, have been acquired to the first occupants in this case on other grounds.

Arnold and Sewel, for the Crew of the second Vessel.

For the Crown, the King's Advocate—The pretensions of the original finders in this case are wholly unfounded. Whatever may be the title by occu-

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3 Edw. 1. c. 4.
17 Edw. 2. c. 11.

pancy in a state of nature, it can have no place here: the law of this country has long ago assigned the property of goods so situated to the crown. It is an axiom of law so clear, and established by ancient statutes, that it is unnecessary to enter into any argument to support it: the claimant indeed will not venture to assert a distinct legal property in these goods; but it is insinuated, that there is a certain proportion of reward, so established by practice, and so fixt as a rule, that if it is admitted, it must produce the same effect. But no traces of this practice can be discovered later than the times of Charles II. The forms of practice that have been cited are of that reign. The extract which has been relied upon, is from a sentence in the year 1683. It cannot be denied that an alteration has taken place in practice since that time; for a variety of precedents may be produced to shew that a different rule has prevailed during the present century, by which the reward has always been apportioned to the merits of each separate case: indeed, an indiscriminate fixt proportion would have in it something of absurdity. It is submitted, therefore, that it is under this reformed practice, that the Court will exercise its discretion on the particular services of the several claimants in the present case.

JUDGMENT.

Sir *W. Scott*—This is a case of a ship and cargo found derelict at sea, and certainly it is a case of legal derelict; for it is by no means necessary to constitute derelict, that no owner should afterwards appear.

appear. It is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery: I say, without hope of recovery; because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment.

Sir *Leoline Jenkins* defines derelicts to be, "Boats or other vessels forsaken or found on the seas without any person in them: Of these the Admiralty has but the custody, and the owner may recover them within a year and a day (a)."

This case, therefore, is to be considered as derelict; and in that form the proceedings were originally commenced against both the ship and cargo: the ship has been claimed and restored: the cargo has not been claimed; but there was reason to expect an owner would appear, as there were papers on board describing it to be the property of a neutral owner. Some suspicions occurred, however, that it was in fact the property of an enemy; and under these circumstances it became expedient to proceed against it as prize, for the purpose of meeting the pretensions of the ostensible neutral owner, and of bringing the examination of his claim, where alone it could be properly discussed, into the Prize Court. These measures were highly necessary, and therefore no objection can justly be made against the mode of proceeding, which has been pursued in this case on behalf of the crown.

It has been contended, that this being a case of derelict, is therefore not a case of salvage; and a distinction has been made, as if salvage was one thing,

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(a) *Life of Sir Leoline Jenkins*, vol. 1. p. 89.

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and derelict another: but I must observe, that the parties themselves, in the very outset of the case, alleged themselves to be salvors, and prayed to be rewarded in that character. This distinction, therefore, is not very consistent with their own plea.

It is farther argued on the same principle, that it is the property of the goods, and not a mere title to reward, that has been acquired by these finders by right of occupancy; and it has been attempted to support this demand by various citations from the civil law. It is certainly very true that property may be so acquired: but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant. But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons; as, for instance, to the State itself, or to its grantees.

It will depend, therefore, on the law of each country to determine, whether property so acquired by occupancy, shall accrue to the individual finder; or to the Sovereign and his representatives? and I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the Sovereign, if no owner shall appear. *Selden* lays it down as a right annexed to sovereignty, and acknowledged amongst all nations ancient and modern. *Loccenius* mentions it as an incontestable right of sovereignty in the north of Europe. *Valin* ascribes the same right to the crown of *France*; and speaking

De Dom. Maris,
lib. i. c. 24.

Lib. i. c. 7. 10.
Lib. iv. tit. 9.
art. 26.

speaking of the rule in *France*, that a third shall be given to salvors, in cases of shipwreck, expressly applies the same rule to derelicts, as standing on the same footing. In *England* this right is as firmly established as any one prerogative of the crown: I have already adverted to the authority of *Selden*.—In some manuscript notes, which I have of a very careful and experienced practiser in this profession, Sir *E. Simpson*, he says, “By Marine Law the Lord “High Admiral has the custody of derelicts found at “sea: if no owner appears they become perquisites “of Admiralty: the finder can have no property in “them; only a reward for his trouble, in preserving “them; if no owner appears, or if the claimant can- “not prove his property, the salvors have not acquired “any right in the thing found, but they must be satis- “fied for their expence and trouble from a sale of the “ship and cargo.”—And indeed in the very case for which I am indebted to the industry of Dr. *Swabey*, the title of the crown is fully recognized.

But another question is started: whether, although the crown is allowed to have the exclusive right of property, in cases where no owner appears, there is not an universal rule that gives to the finder, in all cases alike, without regard to the degrees of merit or service, one moiety of the thing preserved? We should certainly not be very desirous to find such a rule; nor could we wish to reduce to one dead level the various degrees of merit that must perpetually occur, according to the particular circumstances of each separate case.—If there was such a rule, however, it would be my duty to obey it; but I can find no such rule in the general maritime law: I have looked into the

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the books on this subject; in *The Consulato del Mare*, and in other books, I find no such rule: I find no such rule established by the practice of other *European* nations.

By the citations which have been made from the Black Book of the Admiralty, it does indeed appear that anciently the division which usually took place between the Lord High Admiral and the finder of derelict, was by moieties; and the papers to which my attention has been called by Dr. *Swabey*, do shew something of a continuance of such a rule down to the time of *Charles II*.—It appears from those papers, that the whole was condemned as of right to the king, and half was afterwards given to the finder. There still remains some ambiguity, however, in what manner this share was given; whether in conformity to a general rule then conceived to be binding, may be doubted: though I am inclined to think it was.

In later cases, however, I find no observance of any such rule. In 1777, there was a case of considerable merit, in which Sir *G. Hay* gave only a third. In 1779, there was another case of a bag of money found in the sea, of which three eighths were given. A case has been cited by the Advocate of the Admiralty, in which Sir *W. Wynne*, then King's Advocate, and the then Advocate of the Admiralty (a), recommended it to the crown to allow a moiety; but I do not understand that opinion to have been given in conformity to any positive or prevailing rule.—“ It appears to us,” says that opinion, “ that the salvors are entitled to a “ moiety for the merit which they have had in this

(a) Sir *W. Scott*.

“ trans-

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“transaction.” By these words they evidently appear to have taken their measure not from any precise rule, but from the particular circumstances of the case, and imply therefore a denial of the existence of any express rule at that time.—The notes of Sir *E. Simpson*, which I have before cited, prove that he knew of no such rule; for after saying, “In such a case it becomes a perquisite of Admiralty;” had there been such a rule, he would naturally have added: not, as the words now stand, “*The salvors must be satisfied for their expence and trouble; but the salvors shall take a moiety:*” he therefore had no knowledge of such a rule.

On a view of the whole argument, and looking at the latest practice of these courts, I am of opinion that there is no such rule: it may have existed, and become obsolete. Many alterations in practice we know have taken place since the compilation of the Black Book of the Admiralty; and perhaps there may have been a change on this point. If such a rule ever existed, it is become obsolete; and as there is nothing reasonable in the principle, that should induce us to wish for its revival, I shall pronounce the salvors not to be *de jure* entitled to a moiety: but applying the discretion of the Court to the circumstances of this case, I shall decree to them two-fifths of the cargo saved.

The next consideration is, who are the salvors? and in what proportion is the reward to be distributed amongst them?—There are three different parties; the crew of a small vessel who first took possession, ten in number; the crew of another small vessel coming to the

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the assistance of the former, three in number; and, thirdly, a gentleman, a magistrate, who interfered in a later stage, and wishes to be considered as a salvor. With respect to the two former parties there can be no doubt, they are both entitled: but it is contended on behalf of the first set, that they are the only salvors; and that the second ship's crew ought to be paid only for assistance and labour; but not as salvors. On the other side, the second crew demand to be placed on an equal footing with the first. In my opinion the justice of the case lies between the two pretensions: I think the second crew gave assistance very material in its effects, but of a subordinate nature; I shall therefore consider them as salvors of a second class, acting under the direction of the first, and decree them to take but half shares.

I come now to examine the pretensions of the magistrate; and I can try them only by his own affidavit, as there is no other evidence which takes any notice of them: I do not remember any case in which a magistrate acting in discharge of his public duty has demanded to be considered as a salvor; and therefore I do not much wonder at the diffidence which has restrained this gentleman from giving in his claim till a very late hour: this however is certain, that if a magistrate acting in his public duty, on such an occasion, should go beyond the limits of his official duty, in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor; it will be therefore necessary to inquire what has been the extent of this gentleman's services: if they amount only to the ordinary discharge of his duty, I shall be disposed

disposed to leave him to the general reward of all good magistrates, the fair estimation of his countrymen, and the consciousness of his own right conduct.

Now I do not discover any peculiar vigilance or activity in his conduct on this occasion: the first finders sent to him to inform him of the situation of the vessel, and offered to put it into his possession; so far he is only passive: but he goes on to state as an eminent service, "that he sent fifteen men, under the "obligation of an oath, which he administered to "them, to assist; and that by their exertions the "ship was righted in the harbour; and two hundred "persons who had come down," as it is said, "ac- "cording to the custom (a) of that coast, for plunder, "were driven off."

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Now

(a) The barbarous practices of individuals on a remote coast require no comment; but it is a matter of surprise to see that owners under this distress should ever have met with obstruction in the recovery of their property, from the claims and pretensions of States.

The laws of *Rhodes* are supposed to have made wreck a fiscal perquisite, to the exclusion of the owner. *Seld. Dom. M. lib. 1. c. 25.* and, these laws being adopted as the maritime laws of *Rome*, the same harsh principle prevailed amongst the *Romans*, till *Antoninus* (as it is generally held) corrected it. *Code xi. tit. 5.* In the later periods of the *Roman* empire it was again revived; and on the dissolution of the empire, wreck seems to have become a common perquisite of the State, in the maritime nations of *Europe*. *Valin. lib. iv. tit. 9. Vinnius on the Inst. lib. ii. tit. 1. art. 47. note 5.*

In *England*, so early as the 3d of *Edw. I. c. 4.* a distinction was made, reserving wreck to the crown only where no *man, cat, or dog*, that is, no living creature escaped; and in cases where it was not claimed within a year and a day. These animals have been long considered

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Now I must say, that if a magistrate was aware that such a barbarous custom prevailed in his neighbourhood, it might have occurred to him that his presence was requisite on such an occasion. The presence—the eye—the voice of a magistrate avail much. It does not however appear, either that he

considered as “put only for examples; as it is, now held, that not only if any living creature escape, but if *præf* can be made of any of the goods or lading which come on shore, they shall not be forfeited as wreck.” *Bl. Com.* b. 1. c. 8. If so, the technical distinction seems to be done away; and there can be no difference between things *wrecked* and goods dispossessed by *strandisg* or other accidents of the sea: with respect to these, the 12 *Anns.* b. 2. c. 18. made perpetual by *Stat.* 4 *Geo.* 1. c. 12. removes the old limitation of time for claiming, by directing the goods to be sold at the *expiration* of a year and a day, and the proceeds to be deposited in the Exchequer for any owner that shall appear and make sufficient proof. The 26th of *Geo.* 2. c. 19. makes it a capital felony to steal from ships in distress, whether wreck or no wreck: these statutes seem to afford as much protection to property in this calamitous situation as law can give.

In *France* it was not without a longer struggle that this simple and most obvious duty of humanity was established; so late as the reign of *Hen.* II. a memorable instance occurs. The ambassador of the Emperor of *Germany* claimed two vessels, wrecked on the coast of *France*, for the Emperor, and received an answer from the Constable *Montmorenci*, “That they were the perquisite of the crown of *France*.” And again, “Ita jus invaluit,” says *Bodin*, “ut ne *Andreas quidem Doria* queſtus fit, de navibus in litore *Celtico* *ejectis, et a præfecto Classis Gallia direptis.*” *Valin*, lib. iv. tit. 9. It does not appear how soon the right of the owner was again admitted in *France* (for it had been before recognized in former ordinances); but *Valin* thinks the claims of owners have met with no opposition from the State since the ordinance of 1584.

It is scarcely necessary to add, that every humane provision is made for the alleviation of accidents of this nature, in the excellent marine ordinances of *Louis the XIV.*

attended, or that he was prevented by unavoidable accidents from attending. As he did not attend, I think there was reason enough to fear that those fifteen men might conform to the barbarous *lex loci*, enforced as it was by a multitude of two hundred persons; and that they might think much more of the plunder they could take, than of the oath which they had taken. However, it does turn out, by great good luck, that these fifteen men put to flight the two hundred.—I own, I see more good fortune in the event, than prudence in the measure that was pursued: at any rate the fifteen men must be paid very liberally for their assistance.

A second plea of merit advanced on the part of this gentleman is, that he sent notice to the *Swedish* consul, and to *Lloyd's* Coffee-house: so far he acted with great propriety;—perhaps more might have been done. It is fit a magistrate should know that, when a ship comes into port in the condition of this vessel, there are interests of the Crown which, on behalf of the public, it is his duty to protect. Notice should have been sent also to the officers of the Crown.

Upon the whole, commending this magistrate for what he did, but thinking that he might perhaps have done more, I am not authorised to pronounce that he is a *salvor* in this case—nor entitled to any share of the salvage, which I decree to be paid to the other parties (a).

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(a) The value of the ship, cargo, and freight, amounted to about 12,000*l.*

*Dec. 7th,
1793.*

The law of *England*, on re-capture of property of allies, is the law of reciprocity; it adopts the rule of the country to which the claimant belongs.

Lords, Jan. 28,
1795.

THE SANTA CRUZ, PICOA Master.

THIS was a case of a *Portuguese* vessel taken by the *French*, and retaken by *English* cruisers, after being a month in the possession of the enemy: it was the leading case of several of the same nature, as to the general law of recapture between *England* and *Portugal*.

For the Captors, the King's Advocate and Lawrence—This is a case of a *Portuguese* vessel taken by the *French* on the 1st of *August*, and retaken by *English* cruisers on the 28th. The *French* had sent away or destroyed the papers, so that there did not appear sufficient proof of the property; but all inquiry upon that point was superseded by a consideration of law. In the opening, on a former day, the whole case was distinctly placed on the authority of the decision in the *San Iago*; and the principle of reciprocity which determined that case was so readily admitted by the Court, that the parties were immediately referred to produce evidence respecting the law and practice of *Portugal* on the subject of recapture: the principle of law therefore must be held to be established: the evidence of the fact is now before the Court. On the part of the captors, it consists not of ordinances and expositions of ordinances, but of acts which no argument can affect: they appear in the proceedings of the Court of *Portugal*, on two *British* ships, *The Anne* and *The Endeavour*, which coming out of the hands of the *French* into the possession of *Portuguese* subjects, were claimed for the original owners, but were condemned as lawful prize.

On

On these grounds, on the authority of the law of *Portugal*, it is submitted, this vessel must be condemned to the *British* captor.

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For the Claimant, Arnold and Sewell—This is a case which respects the property of an ally, recaptured from the common enemy; and the question is, why restitution should not pass to the original proprietor? On all general reasoning, and the principles of common equity, it is a demand that seems to admit of no opposition; but it is still more strongly supported by the ancient law of *Europe*, and the daily practice of these Courts: in respect to the time when property is to be deemed converted by capture, the ancient law of *Europe* (*Consol. del M. c. 287. Bynk. Q. J. P. lib. i. c. 4 & 5.*) held, that a bringing *infra praefidia* was absolutely necessary to fortify the possession of the captor, and divest the original proprietor of his claim. Some nations have indeed, by later regulations, substituted a possession of twenty-four hours as a state of sufficient security, but it is an alteration which does not appear to be founded on any rational principle; and what is of more importance to the present argument, it has never been admitted into the practice of these Courts (*a*); for this country has ever

(a) It is asserted by *Albericus Gentilis*, *b. i. c. 3. Hisp. Adv.* and repeated after him by *Grotius*, *b. iii. c. 6. f. 4. note 7.* that *England* was among the nations that had adopted the rule of twenty-four hours; but it is questionable, whether this practice ever prevailed here. So far back as 1672, we have the testimony of the then judge of the Admiralty, *Sir L. Jenkins*, that he could find no traces of it in the earliest part of the last century: his words will shew, that it was not introduced during the *Usurpation*, nor acknowledged afterwards by him.

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ever resisted the innovation, and adhered strictly to the old rule as a fundamental principle of its prize law.

But it may be said, this practice stands upon the regulations of our prize-acts; the acts however but carry into effect the principle of the old and general law; and were they even in this respect matters of novel institution, whilst they prescribe a law to *British* subjects, they would create an equitable right for our allies to have the benefit extended to them; and in fact the right to restitution, on whatever grounds it is founded, has always been acknowledged in the practice of this Court.

In the present war, there have been many cases relating to several of our allies, in which it has been

On a case referred to him by the King, he reports: "In
 " *England* we have not the letter of any law for our direction;
 " only I could never find that this Court of Admiralty, either
 " before the late troubles or since your Majesty's happy restora-
 " tion, has in these cases adjudged the ships of one subject good
 " prize to another; and the late usurpers made a law, in 1649,
 " that all ships rescued, whether by their own men of war, or
 " by privateers, should be restored on paying one-eighth salvage,
 " without any regard to the time such ship had been in pos-
 " session of the enemy, or to any other circumstances, unless the
 " ship taken were made a man of war by the enemy: and in that
 " case a moiety went for salvage, but the ship was still to be re-
 " stored. Whether the usurpers intended this as a novelty or
 " an affirmation of the ancient custom of *England*, I will not
 " take upon me to determine, only I will say, condemnation
 " upon the enemy's possession for twenty-four hours is a modern
 " usage."

In this case, the capture had been on the 7th, and the recapture on the 12th of June 1692, but the ship was restored. *Life of Sir L. Jenkins*, vol. ii. page 770.

so adjudged; there are some also relating particularly to *Portugal*; and others may be produced from the earliest parts of the present century: in 1703, *The Saint Catherine*; in 1707, *The Blackifion*, both Portuguese vessels, were restored, on recapture, after having been many days in the possession of the enemy, but never carried into port: in the present war, *The Memphis*, *The Minerva*, *The Joacim d'Alva*, all Portuguese vessels have been restored without opposition; and sufficiently establish the law of this country to be towards allies, as well as towards *British* subjects, a law of restitution on salvage.

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But between *Portugal* and this country, the rule has also been recognized and confirmed by treaty: By the treaty of 1654, art. 19. the two countries bind themselves to "restore prize goods brought into "the ports of either by an enemy;" and therefore they must *a fortiori* be bound to restore in recaptures arising from the operations of a joint and common war; it is said however, that these equitable principles, and the established practice of this Court, must now give place to a minute reciprocity—to an inquiry into the law of *Portugal*, and into the fate of each individual case which has occurred before the tribunals of *Portugal* on the subject of recapture; and on this point, the whole argument rests on the case of the *San Iago*. But without impeaching the justice of that decision, it may be allowable to deprecate the application of it as a general rule of law: it was not so pronounced, nor in that extent; it respected a different country; it is a single case, and remains at present unsupported by any series of decisions to establish the principle of it, to be an universal

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universal principle of prize law.—The name and character of *England* seem to require, that such a country should administer justice by a firm adherence to principles which it has itself approved, rather than by occasional references to foreign codes. The inconvenience of resorting to the law of foreign countries amounts in some points of view almost to an absurdity: we shall have rather a medley of particular cases than a rational and consistent train of legal decisions. Shall *England* take its law from *Tunis* or *Algiers*? or shall it be left, as such a principle may leave it, to the weakest and worst governed state to give law to the rest of *Europe*?

But even, in respect to the fact, which has been made the subject of inquiry in this case, the claimant has nothing to apprehend: it is certified on the best authority, on the authority of eminent lawyers, and of the principal persons in the government of *Portugal*, that there was no law on the subject of recapture in that country before the ordinance of December 1796. The judges of the Courts of Admiralty make this declaration; and further certify, “that there had been no instance in which recaptured *British* property had been condemned in *Portugal*;” and “that, considering the practice of *England*, and “the treaty between the two countries, they should “have restored *British* property in a similar situation.” Such then was the state of the law of *Portugal* when the recapture was made. The ordinance of December 1796, which declares ships recaptured after a possession of the enemy for twenty-four hours to be lawful prize, is in respect to this case an *ex post facto* law. If that ordinance is applied to the present case,

case, the later ordinance of *May 1797*, which directs restitution, must likewise be applied; but it is still farther observable on the ordinance of *1796*, that it relates only to the ships and subjects of *Portugal*.

A particular explanation has also been given of the circumstances of two cases which have been cited on the part of the captors as a proof of the law of *Portugal*; and it appears, that in these the claimants failed of redress, the one by applying to an incompetent jurisdiction, and the other by relinquishing his claim. In the certificate of the judges, it is stated, "that *The Endeavour* was carried before an incompetent jurisdiction; that the decision was founded on wrong principles; and that there has been since an order given for rehearing the cause before the proper Court."

In *The Anne*, the certificate gives this statement of the proceedings: "The *British* master had obtained an embargo on the vessel, which, on application by the *Portuguese* master, was taken off by the Secretary of State; the *British* claimant then deserted his claim, whilst he was still entitled to bring it before the Court." The Secretary of State also certifies, "that the order given by him to remove the embargo was not intended to obstruct the claim, or prejudge the final decision of the cause." There is nothing then in either of these cases that can be admitted as proof of the law of *Portugal* as it is administered by the proper courts: the judges of those courts declare, "there was no law by which they should have condemned;" but "that they should have restored *British* property under similar circumstances."

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and this statement of the law has received additional confirmation from the subsequent act of the state: for since the circumstances of the present war have called for more explicit declaration of the laws of prize, all doubt has been removed from this question by an ordinance, which expressly directs restitution of the property of allies on the payment of one-fifth salvage. On these considerations therefore, of the equity of the case, of the laws and practice of *England*, and of the rules observed in *Portugal*, the claimant stands entitled to restitution on the accustomed salvage.

The King's Advocate and Lawrence in reply—Under the authority of the *San Iago* it is now unnecessary to argue the rule of reciprocity. It will be sufficient to observe, that it was not laid down in that case as novel in principle, or limited in application: it stands on a principle of natural equity, which must ever prevail between parties acting freely in support of their own rights, and independent of any common control. The Judges themselves recognise the principle when they say, “that looking to treaties, and the *practice* of *England*, they should have restored.” In respect to the treaty of 1654, it is clear, that it has not been considered by this Court as applicable to decide the present question; for if it were so, reference would not have been made for information on the rule and practice of *Portugal*: it is a treaty which refers evidently to a state of neutrality in one party, and therefore does not apply to the cases of a common war.

If it is to be applied by inference or construction, the true meaning of an ancient treaty will best be sought

sought in the practice which has been observed under it: it is attempted to confound principle with the evidence of fact, but the principle of reciprocity being established, the fact only is own to be examined; the opinions and explanations of lawyers can avail nothing against the clear fact, that *Portugal* has condemned *British* property under similar circumstances; it is besides observable, that these opinions and certificates do not assert that there was no law, but that there was no positive law. In this doubtful state of their law, the practice of the Courts of *Portugal* will be the best guide. The public Court of *Lisbon*, acting as appears under a communication with the Cabinet of *Lisbon*, have in two cases adjudged *British* property coming out of the hands of the enemy to the recaptor; on these grounds it is submitted, this vessel must be condemned.—

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The Court, after the argument in the *Santa Cruz*, desired to hear the distinctions that were to be taken, in favor of, or against, the remaining cases.

On the *Santa Reta*, taken on the 12th of *March* 1797, and retaken on the 20th, it was argued for the captors, that subsequent to the ordinance 1796, the law was still stronger and more clear on this point than it was in the preceding case; for that ordinance expressly declared all recaptures after a possession by the enemy for twenty-four hours to be lawful prize.

For the Claimant it was contended—That the ordinance of *December* 1796 related solely to *Portuguese* cases, and left the general law towards allies on the ancient footing; that the only operation which this ordinance

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ordinance could have been favorable to the claimants, as it served to prove that the general law before that time had not led to condemnation.

In the remaining cases, retaken after the ordinance of *May 1797*, it was contended, that the government of *Portugal* having established a general law, and acted under it, was not at liberty to alter this rule during a war; that such changes were introduced from the fluctuations of their own views of interest, and not from any fixed principles of justice; and therefore that they were such alterations as an ally was not bound to admit.

JUDGMENT.

Sir *W. Scott*—These are cases of *Portuguese* ships or cargoes, eight in number, which have been recaptured at different times by *British* cruisers.

As far as the dates of the recaptures are material, they are to be distinguished under three periods:—The first vessel was recaptured before the month of *December 1796*, when an ordinance on the subject of recapture passed in *Portugal*: the second was retaken between the months of *December 1796* and *May 1797*; when another ordinance took place, more expressly respecting the property of allies recaptured from the enemy: the rest may be stated generally, without farther distinction, to have been taken subsequently to the 9th of *May 1797*.—It is necessary to distinguish these dates, as it is said the difference of date may affect the application of the general principle, whatever that may be, to the particular cases.

They are cases of very considerable value, of much importance, and of no mean difficulty in many respects; under a choice of cases, they are not such as

I should

I should particularly wish to determine ; but they devolve on me in the regular course of my duty ; and I am bound to decide them according to my own best informed apprehensions of law and justice, of the general law of nations, as it has been understood and administered in the *British* Courts of Admiralty.

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In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor ; and it certainly is a question of much curiosity, to inquire what is the true rule on this subject ; when I say, *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere ; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general law.

It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours possession ; or it might be the rule of bringing *infra praesidia* ; or it might be a rule requiring an actual sentence of condemnation : either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another : but the fact is, there is no such rule of practice ; nations concur in principle indeed, so far as require firm and secure possession ; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion

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opinion of *European* States more distinctly agreed, on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

That obligation could arise only from a reciprocity (a) of practice in other nations; for from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary, to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in *Great Britain* to act towards them on a more extended principle; and to lay it down as a general rule, that a bringing *infra praesidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effect of adhering to such a rule would be gross injustice to *British* subjects; and a rule, from which

(a) This principle of reciprocity is acknowledged as a necessary principle of prize law, by *Valin*:

“ — Me ferait penser, que les alliés qui aux termes de notre article, ont droit de réclamer leur effets repris sur des pirates par des François, ne doivent s'entendre que de ceux qui suivent la même jurisprudence que nous; autrement, il n'y auroit pas de reciprocité: ce qui blesseroit l'égalité de justice, que les Etats se doivent les uns aux autres.” — *Valin*, I. iii. tit. 9. art. 10.

See also the same principle adverted to in a case arising on the practice of *France*. — *Life of Sir L. Jenkins*, vol. ii. p. 744.

gross.

gross injustice must ensue in practice, can never be the true rule of law between independent nations: for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were THAT established on clearer demonstration than such questions will generally admit. Where mere abstract propriety therefore is on one side, and real practical justice on the other; the rule of substantial justice must be held to be the true rule of the law of nations between independent states.

If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just: to the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country: to the recaptor, it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing amongst his own countrymen, would restore, it brings an obvious advantage; and even in the case of immediate reparation, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

It may be said, what if this reliance should be disappointed?—Redress must then be sought from retaliation; which, in the disputes of independent states, is not to be considered as vindictive retaliation, but as the just and equal measure of civil

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retribution: this will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.

Or it may be asked, what if there is no rule in the country of the recaptured?—I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of *European* States, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails,—the recapturing country must then of necessity apply its own rule, and rest on the presumption, that that rule will be adopted and administered in the future practice of its allies.

Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular: it may be so; but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*.—It is asked also, will you adopt the rules of *Tunis* and *Algiers*? If you take the people of *Tunis* and *Algiers* for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards

other nations. And upon the whole of these objections, it is to be observed, that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety: a regulation may be extremely unfit to be made, which, yet, shall be extremely fit, and shall indeed be the only fit rule, to be observed towards other parties who have originally established it for themselves.

So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider what is the actual rule of the maritime law of *England* on this subject.—I understand it to be clearly this: that the maritime law of *England* having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards *British* property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true statement of the law of *England* on this subject: it was clearly so recognized in the case of the *San Iago*; a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir *E. Simson*), which records the practice and the rule as it was understood to prevail in his time. “ The rule is: “ that *England* restores, on salvage, to its allies; but

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"if instances can be given of *British* property re-
"taken by them and condemned as prize, the Court
"of Admiralty will determine their cases according
"to their own rule."

I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law: at the breaking out of a war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores.

It is a principle sanctioned by that great foundation of the law of *England*, *Magna Charta* itself (a); which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

In recaptures, it is observable, the liberality of this country outsteps its caution; it restores on salvage without inquiry, till it appears that the ally pursues a different rule: it may be said, there may be inequality and hazard in this prompt liberality; and we may restore while the ally condemns; and so the fact has been: for it is not to be denied, that before the case of the *San Iago* had introduced a more accurate knowledge of the *Spanish* law, restitutions of *Spanish* property on recapture, had passed as of course; the more accurate rule however is that which I have laid down.

(a) Art. 41. *Omnis mercatores, &c.*—*Et si sint de terra contra nos gwerrina, et si tales inveniantur in terra nostra in principio gwerre, attachiantur sine dampno corporum et rerum, donec sicutur a nobis, vel Capitali Justiciario nostro; quomodo mercatores terre nostre tractentur, qui tunc inveniantur in terra contra nos gwerrina, et si nostri salvi sint, alii salvi sint in terra nostra.*

Id

In the present state of hostility (if so it may be called) between *America* and *France*, the practice of this Court restores *American* property on its own rule, without inquiring into the practice of *America*: it acts on the same principle towards *Danes*, and *Swedes*, and *Hamburgers*, in the ambiguous state in which the rapine of *France* has placed the subjects of these governments:—towards *Portugal* then undoubtedly a less liberal treatment would not be observed: connected by long alliance, by ancient treaties, by mutual interests and common dangers, if *Portugal* forfeits the benefit of a rule which has been before observed as a general rule, it can be only on this ground that the courts of that country have applied a different rule to the property of *British* subjects. The question then for the Court to determine will be simply this: Has *Portugal* applied a different rule to *British* property taken by the enemy, and coming out of their hands into the possession of *Portuguese* subjects?

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But before I enter on this inquiry, it may be proper to consider the treaties that subsist between the two countries; because if they have prescribed a rule, it will render all farther discussion unnecessary. A treaty, to which much reference has been made, thus strongly and emphatically expresses the terms of union between the two countries: “ Neither of the “ confederates shall suffer the ships and goods of the “ other, or of the people of either, which shall at any “ time be taken by the enemies of the one and car- “ ried into the ports of the other, to be conveyed “ away from the owners or proprietors; but the same “ shall be restored to them or their attorneyes, pro-

Treaty 1654,
art. 19.

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" vided they claim them before they are sold or cleared and prove their rights within three months, and pay the necessary expences for preservation and custody." Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations; for no neutral country can interpose to wrest from a belligerent prizes lawfully taken (a); but I think it goes a great way to prove the spirit of the contracting parties: and I agree with Doctor Arnold, that it goes the whole length of the present claim; for such a treaty of alliance is not a thing *stricti juris*, but ought to be interpreted with liberal

(a) The notion of receiving restitution from a neutral power seems, soon after this treaty, to have been found to be inconsistent with the rights of Belligerents, as acknowledged by the law of nations: between the year 1666 and 1670, there is this report, among the letters of Sir L. Jenkins:—

" The question in law is, Whether this *Biscainer*, being brought into your majesty's port, ought not, on account of your majesty being in amity with the Catholic king, to be rescued from under the power and force of his enemy; and *jure postliminii* to be restored to his own. The law of nations, as it is at this day observed, seems not to pass any obligation on your majesty to impart your royal protection unto one friend to the prejudice of another; this captor being *jure belli*, which is a very good title, in full and quiet possession of his prize, and so he was for a fortnight together at *Portsmouth* before he was discovered, will take it for an act of partiality to have it now wrested out of his hands and given to his enemies: whereas no man's condition is to be made worse than another's, in a place that is reputed of common security upon the public faith. Besides, the French ordinances do expressly provide, that leave be given to all strangers to depart those ports with such prizes as they happen to bring in: it is the practice of *Spain* at this day, and of all other ports that I can learn any thing of, in cases of neutrality." *Life of Sir L. Jenkins*, vol. ii. p. 732.

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explanations.—And although it may seem to point more immediately to a state of things in which one of the contracting parties is neutral; yet it would be strange to say, that it binds the party to seize for the purpose of restitution, where there is no right of seizure; but that it shall not oblige him to restore, when he has a complete right of seizure, and has already acted on that right.—The treaty does therefore in its spirit and meaning embrace the restitution of property.

But then again, I am to inquire, Whether *Portugal* has put the same interpretation upon it? for if that government has used a different interpretation, that forms the rule which I must follow: the case therefore upon the treaty comes exactly to the same question, as the case upon the law: what has *Portugal* done? what acts are there, from which we may collect the construction which *Portugal* puts upon the law, and upon this treaty?

I come then to this important question on the fact:—On the original papers and depositions nothing appeared; restitution therefore would have passed on salvage, according to what I have described to be the law of *England*; but the captors offered papers to shew that a different rule had prevailed in *Portugal* with respect to *British* property: in this state of doubt, the Court ordered farther information, and proof to be produced, respecting the law of *Portugal* on recapture, and BY BOTH PARTIES. Now the first question is; Who is more particularly expected to produce this proof? And it has been much pressed by the counsel for the claimant, that the *onus probandi* lies on the recaptors: it lies with them, it has

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been said, to shew that *Portugal* uses a different rule; or at least to raise a strong presumption of that fact.— But I am of opinion, that the recaptors have sufficiently discharged their duty to the Court, by the papers which have been produced.

The *onus probandi* then shifts: and it becomes a duty on the claimants to exonerate themselves from the presumption raised against them, and to shew that their law is not such as the *prima facie* evidence of the recaptors represents it to be.

They have besides great advantages in this research: the law and the country is their own: access is easy to them, to the best information. They have reason to expect all that the diligence, the acuteness, and the zeal of their countrymen can produce on their side: but the captors must hunt out a foreign law, through a foreign language, and with the assistance of professors not much disposed to promote their inquiries: the means are evidently unequal between the parties; and the means being unequal, the obligation is by no means equal: all defect of proof, therefore, must press principally on the claimants; from whom the Court is entitled to expect proof of the fullest and most satisfactory nature.

It has been asked, What proof must we produce? The question admits of an obvious answer: In the first place the Court will expect the text law, the existing ordinances; now I think it does appear, that there are ordinances on the subject which have not been produced: the ordinance of 1796 refers to an ordinance of the year 1704, as the basis on which it was framed; I have therefore a right to conclude, that this ordinance has formed the substance of the

Portuguese prize-law for a century ; but yet no notice has been taken of it.—In the next place, information would be required respecting the decisions which have passed on their own recaptures ; and if none such can be found, a certificate to this effect should be exhibited ; but there is no certificate : besides, it is, I think, scarcely probable that there should not have passed some decisions on this subject previous to *December 1796* ; *Portugal* has been active in the war ; and the enemy has been active on those coasts ; recaptures must have occurred ; they must also have been brought to adjudication, and the rule by which they have been decided would have been considered by me as the law of *Portugal*.

It might have been expected also, that authorities even more immediately in point might have been produced, from decisions respecting the recaptured property of allies : some instances cannot but have occurred previous to *May 1797*, when an edict issued on that subject. Three cases have occurred within three months after the edict, and afterwards many more ; and it is scarcely probable, that so many should have happened after that time, and none before. — It has been suggested, that the records of *Portugal* are not so kept as to furnish a ready answer to such inquiries ; but I cannot admit an excuse so dishonourable to the tribunals of that great country : there is therefore a defect of evidence, for which no sufficient reason has been given on the part of the claimants.

After this statement of the reasonable expectations of the Court, let us now see what evidence has been produced : it consists of many documents, of which some must immediately be dismissed, as of no use or auth-

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rity in this case : of these, the first is a certificate from the *Portuguese* minister plenipotentiary at this Court. As far as character truly honourable both in public and private life, can give weight to an opinion ; as far as a conviction, that the party delivering that opinion delivers the sincere and unbiased persuasion of his own mind, can influence me to respect it ; this opinion must command the greatest attention ; but the whole weight of this opinion is confined to these considerations : for it is to be remembered, that the Chevalier *d'Almeida* is not a professor of the law, but a diplomatic character ; and therefore incompetent to instruct us in questions of law.

Another paper which I shall dismiss also, is an opinion of Mr. *Da Sylva Lisboa*, described to be a lawyer of considerable eminence in his own country. Upon this opinion many observations have been made, and more particularly on the impropriety, with which it undertakes to explain to us the *British* laws of recapture ; whilst it almost pleads ignorance of the *Portuguese* laws on the same subject. It is scarcely necessary to observe, that the representation which it gives of our law is erroneous ; it is, besides, very deficient in the preliminary circumstance which can alone give credit to it, or even make it intelligible to us ; for it is not accompanied by any statement of the questions that were addressed to this gentleman : he could scarcely have imagined that the *British* Court of Admiralty would apply to *Portuguese* professors for information on *British* law ; and we are at a loss to conjecture, in what view he could suppose we should derive any knowledge of the law of *Portugal* from such an opinion : it would perhaps therefore be but due civility to the reputation of this gentleman, to consider

consider it as an opinion hastily obtained, on an imperfect representation of the case; and under this character, as it can avail nothing in point of authority, I would recommend it to those who may have to argue this cause again, if it should go to an appeal, to dismiss this paper wholly from the case.

The last paper which I shall dismiss is, the certificate of Mr. *Nash*, a reputable merchant of this town: this paper relates something of a transaction that has happened to *Portuguese* masters accepting from the enemy, by donations, ships taken from the *Portuguese*.

“ The enemy had captured a number of vessels, “ some *Portuguese*, some *English*; and willing to dis-“ encumber themselves of their prisoners, they gave “ to the *Portuguese* and *English* masters jointly, one of “ the *Portuguese* ships: on carrying their present “ into *Portugal*, these persons are represented to have “ been severely treated, and to have been imprisoned “ by the Government.” I am at a loss to understand this account, when I recollect the cases of *The Anne* and *The Endeavour*; unless I am to suppose, that this severity was practised on them subsequently to the last ordinance, which pronounced such donations null and void; for otherwise I must suppose, that donations of *Portuguese* property were considered void, whilst similar donations of *British* property were held to be perfectly good and valid: the same paper informs us farther, “ that the *Portuguese* masters re-“ mitted to *England*, to the captains of the *English* “ vessels, a part of the proceeds as their share of the “ donation:”—I am sorry for it; because the property belonged not to either party, but to the former *Portuguese* owners; and no interest could accrue

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to those masters, but an ordinary salvage on restitution to the original proprietors.

This certificate cites also, as a sort of precedent, the acceptance of four pipes of wine, in the same manner, by an *English* captain, *Bennet*. It would be ridiculous to treat the conduct of this man as an authority; it was an irregular proceeding, and as irrelevant to this case, as the former parts of this certificate.

Laying aside, therefore, these several documents, I come now to examine those papers which may be considered as matter of evidence in the case: these are on the part of the claimants; 1st, Opinions of *Portuguese* lawyers; 2dly, A certificate of the judges of the Supreme Court of Admiralty in *Portugal*; 3dly, The decree of the queen of *Portugal*, Nov. 1797, in the case of *The Anne*; and, 4thly, A certificate of the foreign Secretary of State of that country, Mr. *Pinto de Souza*. But it is scarcely possible to consider the effect of these documents, without bringing under our view those at the same time, which have been brought in by the captors: these are the ordinances of Dec. 1796, and of May 1797; and the proceedings relative to the *British* ships *The Anne*, and *The Endeavour*.

In the ordinance of December 1796, no mention is made of the recaptured property of allies. The ninth article refers only to their own recaptures: but a reasonable presumption arises from it, that they would apply the same law to their allies; for this principle is not only liberal and just, but it is actually observed in the practice of *England*, *France*, and *Spain*: a presumption therefore arises, that *Portugal* would pursue

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pursue a similar rule: but I think there are two circumstances which convince me, beyond mere presumption, that *Portugal* did act on this principle, and did mean to apply its own rule to the cases of allies. In the case of *The Endeavour*, which concerned the property of an ally, the sentence was in these words: "Having heard what has been alleged concerning the rule of twenty-four hours, it appears to us, that that rule serves only to regulate the right of actions arising on recapture." Now, certainly, if this rule on recapture did not apply to the property of allies, it would have been entirely irrelevant, to discuss that rule in such a case. — We may infer, therefore, I think, that the rule of twenty-four hours possession was the rule of *Portugal*; and also that had the case of *The Endeavour* been considered as a case of recapture, it must have been governed and decided by that rule. The manner in which *Portugal* has acted on the last ordinance, confirms me also in supposing that it was the practice of *Portugal*, to extend its own rule to the cases of allies. The salvage there ordained for *Portuguese* property is one fifth, and this proportion has been observed also in subsequent cases of *British* property, although it is not the proportion of salvage which our own law prescribes: I may therefore conclude it was the practice of *Portugal* to apply its own law to the case of an ally.

But, it is said, this rule of twenty-four hours possession had not prevailed in *Portugal*, before the ordinance of 1796: that ordinance, I must observe, professes to take for it basis the ancient ordinance of 1704; and, therefore, I may presume that ancient ordinance was fundamentally the same. Had there been a differ-

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ence so material, it was the duty of the claimant to have produced that ordinance for the information of the Court; and to have convinced us that the modern practice was a change and alteration in the jurisprudence of *Portugal*. It cannot, indeed, be supposed, that an alteration so monstrous, so gigantic, so opposite to the general course of the relaxations which have gradually taken place in the law of prize during this century, should have found its way into the courts of *Portugal*, and have been adopted by them for the first time in 1796. We know it to have been the ancient law of *Spain*. The vicinity of the two countries, their affinity of habits, the resemblance of their legal institutions, still farther strengthen the probability, that this rule had also been the ancient law, or at least the usage of *Portugal* on this subject.

I consider myself, therefore, justified to conclude, that the law of *Portugal* established twenty-four hours possession by the enemy to be a legal divestment of the property of the original owner; and also, that it would have applied the same rule to the property of allies.

But I acknowledge it is not sufficient to say such a rule *would have been* applied. It is also necessary to shew, that there have been actual proceedings under it; and for that purpose two cases have been produced: the cases of *The Anne* and of *The Endeavour*.

The case of *The Endeavour* was, I believe, prior in time. It was the case of a *English* ship taken by the *French* on the 24th of January 1796: the *French* captain gave it to the master of a *Portuguese* vessel, which he had also taken: the ship was carried into *Portugal*: the *English* master demanded restitution; but it was denied to him, not only by the individual, but

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but also by the courts of justice of *Portugal*. The case of *The Anne* happened in September 1796, and is in one respect still stronger than that of *The Endeavour*; as it was a ship given in the same manner by the *French* captor, to the very man who had been the master of this vessel, *The Santa Cruz*: let us suppose the master had been also the owner of *The Santa Cruz*: by what justice could he have claimed to have his own property restored from *British* hands, at the same time that his own law confirmed him in his refusal to restore *British* property, under circumstances precisely similar?—but restitution, it seems, was refused, under a particular order of the state, which declared “the property of the *English* owner had been divested, and “that the title of the *Portuguese* owner was good and “valid.”

Now these are two cases strongly in point; and unless they can be overthrown, they will, I think, sufficiently establish this fact; that it was the practice of the courts of *Portugal*, either under ancient ordinances, or under a silent, but prevailing usage, or under some recent edict, to confiscate the property of allies coming into the possession of *Portuguese* subjects from the hands of the enemy: it is immaterial under which of these authorities the practice prevailed. These decisions are represented to us to be the only decisions that have passed, during the present war on that subject; and they, therefore, establish the law of *Portugal*, from whatever sources it might be derived,

But the force of these cases has been attacked in different ways. It is said in the first place, that they were cases not of recapture, but of donation; and it has

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has been attempted to raise distinctions between these titles: but in all legal considerations they are precisely the same; they are both equally matter of prize: donation between enemy and enemy cannot take effect. The very character of enemy at once extinguishes all civil intercourse, from which such a title could arise. So distinctly is this rule acknowledged to be the law of this country, that if a case should happen, in which an enemy after capture had made a donation, as it is called, in this manner to the original owner; that vessel must be condemned as a droit or perquisite of Admiralty; and the original proprietor could acquire no interest but as salvor, or from the subsequent liberality of the crown.

I think I have evidence also that this matter is so considered in *Portugal*.

In the certificate of the Secretary Mr. *Pinto de Souza*, he says, " the order given by him was not intended to suspend the suit of the *English* claimant but only to dispose of that property which of right belonged to the Queen, as being acquired from the enemy without letters of marque." It is then under this description, only the case of prize taken by a non-commissioned captor: and in this Mr. *Pinto de Souza* seems to coincide exactly with us, in the view in which we should have considered it here. It has been said, however, that the law of *Portugal* does distinguish between donations and recaptures; but it is sufficient to observe, that no proof has been produced of this assertion; and besides, it is a distinction which cannot in the nature of things reasonably exist; nor indeed should I consider myself by any means bound to pursue a foreign law through

through a variety of minute and subtle distinctions, which at last perhaps might be found to exist only in theory. It would be sufficient for me to know, that I understand the practice, as it has been administered in the only cases that have occurred on this subject.

But, it is said, these cases were decided before an incompetent tribunal; although I believe this objection applies only to *The Endeavour*: this objection however does not appear to have been taken by the *Portuguese* lawyers. In the order of her sacred Majesty, it is said indeed, “the Council of Commerce had “no jurisdiction to decide questions of this nature:” but the certificate of the judges speak a different language; they say, not that the jurisdiction was incompetent; but “that the sentence which had been given “by the Board of Commerce was founded on frivo-“lous and insufficient reasons, and that the party “might have appealed.” The terms used by them are just the terms which would be applied to cases proceeding in their due and ordinary course.

In the case of *The Anne*, it is not, I think, pretended that the court before which it was brought had not a competent jurisdiction: but it is argued against the *British* claimant, that he acquiesced in the decision, when he might have appealed:—But let us see what must have been his prospect of success. The hope which the *Portuguese* lawyers held out to him, is not founded on any opinion on the merits of his case, but on a point of form, “because the order of Council “had not been produced.” Whilst the cause was under investigation, the Supreme Authority of the State interposed, to inform the Court, that the title of the *Portuguese* master was legal and valid. The

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Court of Justice assents to this authority, and decides accordingly; and it is against a decision so deliberately pronounced, and so irregularly influenced by the supreme authority of the Country, that this foreign claimant, the master of a small *English* vessel, is required to persevere:—I must think it could not be expected of him.

Such are the observations which I think myself justified in making on the proceedings in these two cases: and after the general view which I have taken of the whole of this subject, it may be unnecessary to dwell more particularly on the minute parts of the several papers: it is, I think, clearly proved, that before the ordinance of *May 1797*, the courts of *Portugal* considered *British* property coming out of the hands of the enemy as subject to confiscation: in two instances such property was actually confiscated, not by remote and inferior jurisdictions, but in their highest courts, in the capital of the empire, and under the direction of the state. The ordinance of 1797 cannot be applicable to pre-existing cases; I must determine all cases, as if they had come before me at the time of capture. The two former cases, therefore, of this class, can receive no protection from this ordinance.

Looking then to the conduct which *Portugal* had observed towards *British* property, and conceiving myself bound by the general law of this country, and more particularly by the authority of the case of the *San Iago*, to proceed on strict principles of reciprocity, I have no hesitation in pronouncing the first two cases subject to confiscation.

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I now come to the consideration of the subsequent cases. It has already been laid down, that the law of *England* restores on salvage, unless it is forced out of its natural course by the practice of its allies. In the preceding cases it has been reluctantly so diverted from its free course; but in *May 1797*, it appears *Portugal* renounced the harsher principles, and adopted a more liberal rule; upon what ground then can it be contended, that this country must, in regard to those cases which have occurred subsequent to this ordinance, follow the harsh and antiquated, in preference to the new and more lenient rule? It is said, *Portugal* is not at liberty to make such an alteration in time of war; and that those who have once established a rule, must abide the consequences of it: but I confess I see no one reason on which this exercise of legislation can be denied to an independent state.

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It is said, *Portugal* will then legislate for this country; and so must every country in some degree legislate for us, whilst *Great Britain* professes to act upon the old principle, and adopt the law of its ally. In peace it is allowed such an alteration might be made: and why not in a time of war? There are no depending interests to be affected by it: it was an alteration as harmless to the world, as if it had been made in times of most profound peace: but it is said, the law is not even now established on equal terms of reciprocity towards this country. The salvage which *Portugal* has decreed is one fifth, whilst the law of this country restores on payment of a sixth only. Perhaps a rule more closely concurring with our own might have

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have been more convenient: but the difference is not sufficient to justify this country in refusing *Portuguese* subjects the benefit of their alteration. In professing to act on the law of our ally, we must do it for better and for worse.

I therefore restore the several vessels that have been taken since the ordinance of May 1797, on the salvage which *Portugal* has established, a salvage of one eighth to ships of war, and one fifth to privateers.

In the condemned cases, I order the expences of the claimants to be defrayed out of the proceeds.

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THE MERCURIUS, GERDES Master.

Restitution does not bar a second seizure, by other parties, either on the same or different evidence; but a second seizer would be subject to the risk of costs and damages. Warning on the spot sufficient notice of a blockade *de facto*: prohibition to go to *Amsterdam* includes the *Vlie* passage as well as the *Texel*.

Violation of blockade by the master affects the ship but not the cargo, unless the property of the same owner, or unless the owner of the cargo is cognisant of the intended violation,

THIS was a case of a ship taken on a voyage from *Baltimore* to *Amsterdam*: the ship was claimed for a merchant of *Hamburg*; and the cargo as the property of a citizen of the *United States*: on the first capture, the vessel had been restored by consent; but the officers of the Admiralty instituted new proceedings; and the claimant now appeared under protest: *Amsterdam* was said to have been in a state of blockade; and it was contended, that the ship and cargo were liable to confiscation for attempting to enter a blockaded port.

JUDGMENT.

Sir *W. Scott*—In this case three questions arise: 1st, Whether restitution by consent bars new proceedings

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ings? 2dly, How far the ship is affected by an attempt to break a blockade? and, 3dly, How far such a conduct will affect the cargo?

On the first question I must say, that in restoring by consent in the present case, I think the party committed an oversight: such a consent judicially recorded, would bar him from a second seizure: against other parties it could be no bar: but whoever ventures on a second seizure, must make it under the peril of costs and damages. A monition calls upon all claimants; but it does not call upon other captors: nor could a second seizure be made: nor could other parties intervene, as on a fresh seizure, till the proceedings under the first libel had been determined.

The King in his office of Admiralty, is the second seisor in this case; and it is said, that as the fountain of all prize, he is to be considered also as the original captor: but the King holds the office of Lord High Admiral, in a capacity distinguishable from his regal character: besides, although he is undoubtedly the fountain of prize, he has conveyed away his interests in it to various persons: to the commanders and crews of his own ships; to his other subjects by letters of marque; and to the Lord High Admiral of *England*. It has been declared by high authority, that the interest of prize is vested in the captor; and that captors may against the wish of the crown proceed to adjudication.

The case of the *La Paix* (a) does I think sufficiently support the principle for which it has been cited.

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Lords, July 30,
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(a) This was a case of a ship carried into *St. Kitt's*, and restored; and immediately afterwards seized by another privateer.

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cited. In that case new depositions were taken: but the second seisor might in that instance have proceeded, if he had thought proper, on the original evidence.—It is said here, that proceedings should have been by appeal, instead of a second seizure: but there was nothing in the possession of the Court. The proceedings, therefore, by a second seizure, were, in my opinion, not only regular but necessary; and the only means which could have been pursued: I therefore over-rule the protest, and assign the claimant to appear absolutely.

On the second question, it is necessary to inquire; Was there an actual blockade? Was it notified? Was it violated? If all these points can be established, confiscation must necessarily follow. It is the necessary consequence acknowledged in all books, and confirmed by the practice of all nations; nor is it even denied in theory, to be a just penalty by those who have laboured to extend to the utmost, the rights of neutral nations.

By the evidence it appears, that when the vessel approached the *Texel*, the master was warned by the officer who boarded her, that he must not go into the *Texel*. The officer wrote on the manifest, "*Hindered from going into the Texel.*" The inability

who followed her out of the harbour, took her to the island of *Nes*-*vis*, and there obtained a condemnation: the illegality of a second seizure, after restitution, was strongly argued, on appeal; but the Lords decided on the merits, saying, "As the captors can only now contend for farther proof; we are of opinion, that will not be sufficient in this stage, although if this case had been appealed from the first judgment, we should have been disposed to order farther proof." Costs were given against the captor, for misconduct.

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of the master to proceed into the *Texel*, therefore, proves the blockade: for a blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it.

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It has been so determined by the Supreme Court during the present war. The *West India* islands were declared under blockade by Admiral *Jarvis*; but the Lords held, that as the fact did not support the declaration, a blockade could not be deemed legally to exist: but the fact, on the contrary, duly notified on the spot, is of itself sufficient; for public notifications between governments can be meant only for the information of individuals: but if the individual is personally informed, that purpose is still better obtained than by a public declaration. Allusion has been made to the notification given to the *Swedish* government, but I think irrelevantly; for the only declaration to which the claimant can allude, must be one that has been made to his own government.

Much has been said about the purposes of blockade, which I do not think material to the case; I shall therefore pass it over, and proceed to consider what the master himself understood by the notification which he received; and whether he really thought, that though he might not go into the *Texel*, he was at liberty to get to *Amsterdam* by any other course. It appears that he asked the officers who boarded him, whether he might go to other *Dutch* ports; *other*, as must be understood, than the object of his destination. It was never inquired whether he might go to *Amsterdam* by any other course. The master pretended to be proceeding to *Hamburg*, till he came to the passage into the *Zuyder Zee*, and then he attempted to enter

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it. How far the blockade might extend to all the ports in the *Zuyder Zee* I shall not now inquire, because I am sufficiently convinced that the intention of this master was to proceed to *Amsterdam*, in defiance of the prohibition, which he distinctly understood: perhaps the officer might have expressed himself more clearly than he did; but if there had been any thing insidious, in the manner of giving this intimation, I should have thought it my duty to protect the neutral from suffering loss or inconvenience under it.

It is said, this passage to the *Zuyder Zee* was not in a state of blockade: but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and *Russia*, who was the principal party in that confederacy, described a place to be in a state of blockade, *when it is dangerous to attempt to enter into it.*

On the third point, to maintain that the conduct of the ship will affect the cargo, it will be necessary either to prove that the owners were, or might have been, cognisant of the blockade, before they sent their cargoes; or to shew, that the act of the master of the ship personally binds them. In *America* there could not have been any knowledge of the blockade: the cargo is innocent in its nature, and sets out innocently: the master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance, and in revenue cases, where, it is said,

said, the act of the master will affect the cargo, it is to be observed, that the ground on which they stand, is wholly different. In the former, it is in virtue of an express contract which governs the whole case: and in revenue cases it proceeds from positive laws, and the necessary strictness of all fiscal regulations.

It is argued, that to exempt the cargo from this responsibility will open the door to fraud, if neutrals are allowed to attempt to trade to blockaded ports with impunity, by throwing the blame upon the carrier master: but if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation; and it would at the same time be sufficient to cause the master to be considered in the character of agent, as well for the cargo, as for the ship.

Where a cargo is of a contraband nature, it will perhaps justify greater severity; but in cases of contraband it is held, that innocent parts of the cargo belonging to other owners shall not be infected. This is, I think, a parallel case. There is misconduct on the part of the owner of the vessel, but none in the owner of the cargo.

If the evidence of the property of the cargo was sufficient, I should restore that; but as the case now stands, if the captors demand farther proof on that point, it must be supplied.

Ship condemned.

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A vessel coming out of a blockaded port with a cargo, is *prima facie* liable to seizure: if the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation.

THE FREDERICK MOLKE, Boysen Master.

THIS is a case of a *Danish* vessel, taken coming out of *Havre* on the 18th of *August* 1798, and bound on a voyage from *Havre* to the coast of *Africa*. The cargo was miscellaneous.

A claim has been given for the ship and cargo, as the property of the same person, a *Danish* merchant of *Christiana*.

Sir *W. Scott*—Several questions have been raised; respecting the property, the previous conduct of the vessel, the legality of this sort of trade, and the actual violation of a blockade. I shall first consider the last question, because if that is determined against the claimant, it will render a discussion of all other points unnecessary.

First, then, as to the blockade, these facts appear in the depositions of the master, “ that on his former “ voyage he cleared out from *Lisbon* to *Copenhagen*, “ but was really destined to *Havre*, if he could “ escape *English* cruisers; that he was warned by an “ *English* frigate, *The Diamond*, off *Havre*, not to “ go into *Havre*, as there were two or three ships “ that would stop him; but that he slipt in at “ night and delivered his cargo:” it is therefore sufficiently proved that there were ships on that station to prevent ingress; and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent commu-

communication, and a due notice, or prohibition given to the party (a).

But it is still farther material, that this blockade actually continued till the ship came out again. It is notorious indeed that *Havre* was blockaded for some time; and although the blockade varied occasionally, it still continued; for it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind, (if the suspension, and the reason of the suspension are known,) that will be sufficient in law to remove a blockade.

It is said, this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage: but is there that analogy between the two cases which should make the law of one necessarily or in reason applicable to the other also? I cannot think there is such an affinity between them: there is this essential difference, that in contraband, the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

For what is the object of blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded

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(a) It has since appeared, that the blockade of *Havre* was notified to foreign ministers on the 23d of February 1798.

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—
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place. I must therefore consider the act of (a) egress to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

There may indeed be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, that they might not be at liberty to retire.

But even then a question might arise, if it was attempted to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade.

A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intention. In the present case, the ingress was criminal, and the egress was criminal; and I am decidedly of opinion, that both ship and cargo, being the property of the same person, are subject to confiscation.

Condemned.

(a) Such is also the law and the practice of *Holland*.—*Bynkershook*, commenting on the orders of the States General, June 26, 1630, says, “ *Scilicet commercii intercludendi ergo ordines generales portus Flandriae navibus bellicis obsederant, adeoq. omnes quorumcunque naves eo destinatas, indique exentes publicabant; quemadmodum ex ratione, et gentium usu, urbibus obfessis nihil quicquam licet advehere, vel ex his evehere.*” *Bynk. Q. J. P. book i. c. 4.*

THE RINGENDE JACOB, KREPLIEN Master.

Dec. 11th,
1798.

JUDGMENT.

SIR W. Scott—This is a case of a ship under *Swedish* colours laden with iron, hemp, tobacco, and oak logs, and taken on a voyage from *Riga* to *Amsterdam*, on the 15th of *August* 1798.

The ship is claimed as *Swedish* property: the iron for *Russian* merchants: the hemp appears to be the produce of *Russia*; but it is claimed for a *Danish* subject; and some parts of the cargo remain still unclaimed. Objections have been made against the proofs of property as standing chiefly on the evidence of the master, whose conduct, it is said, has shewn him to be unworthy of credit; but I think the property is sufficiently proved.

Three other grounds, however, have been taken, on which it is contended, that the vessel is liable to condemnation: 1st, On account of the use and occupation in which she was employed; 2dly, On account of the contraband nature of the cargo; and, 3dly, For violating a blockade.

On the former point, reference has been made to an ancient treaty between *England* and *Sweden*, which forbids the subjects of either powers “to sell “ or lend their ships for the use and advantage of the “ enemies of the other:” and as this prohibition is connected in the same article with the subject of contraband, it is argued, that the carrying of contraband articles in the present cargo, is such a lending as comes within the meaning of the treaty; but I

Freighting a ship to the enemy is not the lending mentioned in the *Swedish* treaty, Oct. 21, 1666. A contraband cargo alone will not affect the ship, being the property of a different owner. Hemp is contraband under the *Danish* treaty. Unwrought iron is an article *promiscuus*.

Treaty, Oct. 21,
1661. art. 11.

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Ad. art. July 4,
1780.

cannot agree to that interpretation. To let a ship on freight to go to the ports of the enemy, cannot be termed lending, but in a very loose sense; and I apprehend the true meaning to have been, that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction.—It is besides observable that there is no penalty annexed to this prohibition. I cannot think such a service as this is will make the vessel subject to confiscation.

But it is said, there is a contraband cargo. That there are some contraband articles cannot be denied: hemp, the produce of *Russia*, exported by a *Danish* merchant, would be confiscable even under the relaxation, which allows neutrals to export that article, only where it is of the growth of their own country; but to a *Dane* hemp is expressly enumerated among the articles of contraband in the *Danish* treaty; and to say that a *Dane* might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. The hemp must certainly be condemned; but I do not know that under the present practice of the law of nations, a contraband cargo can affect the ship.

By the ancient law of *Europe* such a consequence would have ensued; nor can it be said, that such a penalty was unjust, or not supported by the general analogies of law; for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of contraband

band articles is attended only with the loss of freight and expences; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo, has been connected with other malignant and aggravating circumstances.

The case which has been cited by the King's Advocate, by no means establishes the contrary: that was a case attended with particular circumstances of falsehood and fraud, both as to the papers and the destination of the voyage. It was attempted under colorable appearances to defeat our right of pre-emption, and under a view of all these circumstances together, the Court judged it to be subject to confiscation; but I am not disposed to consider that decision as a general authority, in other cases of cargoes, simply contraband.

On the question of blockade, a doubt arises whether the master had received due notice of it: there appears not to have been any previous admonition at the time of capture. The notice, therefore, if any, must have been under the public declaration: the vessel left *Riga* on the 2d of *July 1798*: the notification of the blockade of *Amsterdam* to the foreign ministers was made here on the 11th of *June*: it might have reached *Riga* before this ship sailed; and I think the probability is on that side; but I cannot take it as an established fact: I shall therefore order affidavits to be produced on that point. With regard to the cargo, the hemp is undoubtedly contraband, and subject to confiscation: but it is disputed whether iron in bars is to be considered as wrought or unwrought; or whether or not it is to be ranked amongst naval stores.

There

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Holtz, Adm.
July 3, 1794.

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There is perhaps no article in nature that comes more exactly under the description of an article of promiscuous use than iron; it is a commodity subservient to the most infinite variety of human uses. As this cargo is going to a port of naval equipment, it would very probably be applied as a naval store; but it may be too much to decide merely on this inference, that it is an article absolutely hostile; nor can I agree to another argument that has been advanced, that, because unwrought iron is excepted, in some treaties, as not contraband; therefore, where no exception is expressed, it is to be considered as contraband. Enumeration takes place in treaties, to prevent misunderstanding: it distinguishes what shall be contraband from what shall not; but the exception of particular articles is not to be there understood in the strict sense, in which it is sometimes said, *exceptio confirmat legem*.

There is besides a doubt in my mind what is at the present moment the relative situation of *Russia* and *Holland*: I do not know that *Russia* is so far engaged as a principal in hostility with *Holland*, as to cut off all communication of trade between them. This is an important point which I shall reserve for farther inquiry and information. In the mean time, it will be equally necessary that the owners of the cargo should prove themselves not to have received notice of the blockade. It will be proper also to refer the iron and the oak timber to the inspection of the officers of the king's yards, that we may be assisted by their certificate, in determining whether they are to be considered as naval stores or not.

THE BETSEY, MURPHY Master.

Dec. 18th,
1798.

THIS was a case of a ship and cargo, taken by the English, at the capture of *Guadaloupe*, April the 13th, 1794; and retaken, together with that island, by the French, in June following. The ship was claimed for Mr. Patterson of Baltimore; and the cargo as American property. The captors being served with a monition to proceed to adjudication, *appeared under protest*; and the cause now came on upon the question, Whether the claimants were entitled to demand of the first British captors, restitution in value, for the property which had passed from *them* to the French recaptors? The first seizure was defended on a suggestion, that *The Betsey* had broken the blockade at *Guadaloupe*.

JUDGMENT.

Sir W. Scott—This is a case which it will be proper to consider under two heads: I shall first dispose of the question of blockade; and then proceed to inquire, on whom the loss of the recapture by the French ought to fall, under all the circumstances of the case.

On the question of blockade three things must be proved: 1st, The existence of an actual blockade; 2dly, The knowledge of the party; and, 3dly, Some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral, liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade,

A declaration of blockade by a commander without an actual investment will not constitute blockade. In a case of neutral property captured and recaptured by the French, compensation was sued from the original British captors, but refused, on the ground of a *bona fidei* possession; irregularities to bind a former captor, being a *bona fidei* possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.

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a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive: but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on "the arrival of the *British* forces in the *West Indies*, "a proclamation issued, inviting the inhabitants of "Martinique, *St. Lucie*, and *Guadaloupe*, to put "themselves under the protection of the *English*; "that on a refusal, hostile operations were commenced "against them all:" but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is farther stated, "that "in January 1794, (but without any more precise "date,) *Guadaloupe* was summoned, and was then "put into a state of complete investment and "blockade."

The word *complete* is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication: but from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general "proclamation to the *French* islands, they were put "into a state of *complete* blockade." It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

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The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect which the captors erroneously ascribed to it: but from the misapplication of these phrases in one instance I learn, that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions, I think we must infer that there was not that actual blockade, which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the Municipality of *Guadalupe*, which states "the island to have been in a state of siege." It is evident that the *American* master speaks only of the difficulty of avoiding the *English* cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of *France*, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy, which we require to constitute blockade: I cannot, therefore, lay it down, that a blockade did exist till the operations of the forces were actually directed against *Guadalupe* in *April*.

It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it: but this is expressly denied by the master. He went in without obstruction. Mr. *Ingleton*'s statement of his belief of the notoriety of the blockade is not such evidence as will alone

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alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in: I shall therefore dismiss this part of the case.

The case being on the first point pronounced a case of restitution; a second point arises out of the recapture of the property by the *French*; and the question is, Whether the original captors are exonerated of their responsibility to the *American* claimants?—It is to be observed, that at the time of recapture *America* was a neutral country, and in amity with *France*. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, Whether the possession of the original captors was in its commencement a legal *bonæ fidei* possession? and, 2dly, Whether such a possession, being just in its commencement, became afterwards by any subsequent conduct of the captors, tortious and illegal? for on both these points the law is clear, “that a *bonæ fidei* possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning.” This is the law, not of this Court only, but of all Courts, and one of the first principles of universal jurisprudence.

Adm. March 5,
1784.

The cases in which it has been particularly applied in this Court have been cited in the arguments; and I will briefly advert to the circumstances of them, as they will afford much light to direct us in the present case. *The Nicolas and Jan* was one of several Dutch ships taken at *St. Eustatius*, and sent

home under convoy to *England* for adjudication. In the mouth of the channel they were retaken by the *French* fleet: there was much neutral property on board, sufficiently documented; and in that case a demand was made on behalf of a merchant of *Hamburg*, for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger, by bringing it home whilst they might have resorted to the Admiralty Courts in the *West Indies*; and, therefore, that the claimants were entitled to demand indemnification from them: but on this point the Court was of opinion that, under the dubious circumstances in which those cases were involved, and under the great pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion which is necessarily intrusted to them by the nature of their command.

It was urged also against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on these grounds our courts rejected their claims.

In *The Hendrick and Jacob* also, the case turned upon similar considerations of the nature of the possession.—It was a case of a *Hamburg* ship, taken erroneously as *Dutch*, and retaken by a *French* privateer. In going into *Nantz* the vessel foundered and was lost. On demand for restitution against the original *British* captor, the Lords of Appeal decided, that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter: that as the *French* recaptor had a justifiable

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possession under prize taken from his enemy; he was not responsible for the accident that had befallen the property in his hands: that if the property had been saved indeed, the claimant must have looked for redress to the justice of his ally the *French*: but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. Under a view of these precedents, we must inquire first into the nature of the original seizure in the present case; Whether it was so wrongful as to bring upon the seisor all the consequences of that strict responsibility which attaches to a tortious and unjustifiable possession?

It has been rather insinuated, than affirmed openly in argument, that there was any thing wrong or unjustifiable in the first capture; but it is said, the great injustice arises from the detention, and from that irregularity of conduct in the captors which has put it out of the power of the claimants to support their claim, and obtain restitution from the *French*.

In respect to the first seizure, although it is admitted now that there was not a blockade; yet it must be allowed also on the other side, that the island of *Guadalupe* was at that time in a situation extremely ambiguous and critical. It could be no secret in *America* that the *British* forces were advancing against this island; and that the planters would be eager to avail themselves of the interference of neutral persons to screen and carry off their property. Under such a posture of affairs, therefore, ships found in the harbours of *Guadalupe* must have fallen under very strong suspicions, and have become justly liable to very close examination. The suspicion besides would

be still farther aggravated, if it appeared, as in this case it did appear, that those for whom the ships were claimed, kept agents stationed on the island; and might, therefore, be supposed to be connected in character and interests with the commerce of the place. It is true, indeed, the Lords of Appeal have since pronounced the island to have been not under blockade: but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise.

The same considerations which justify the seizure, apply also to the second charge of detention in this case: for under these suspicions and these doubts, it was not a slight examination of formal papers that could be deemed sufficient. The captors were entitled to reserve the property so taken for legal adjudication; and as they could not erect a jurisdiction on the spot, so neither were they at leisure then to send the cases to distant courts. The first capture was made April 13: the recapture took place so early as the 2d of June following: there was an interval but of six weeks: the French were, as the subsequent event proves, in great force in those parts: the commanders had much to occupy their attention: the number of vessels taken under these circumstances, was very considerable; and, therefore, it is not to be mentioned as an injurious or unnecessary delay, that in six weeks, so employed, no means were found to bring the ships to adjudication.

But it is said, the irregular proceedings of the captors have rendered them liable to the strictest responsibility. Now, on this point I must distinctly lay it

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down, that the irregularities, to produce this effect, must have been such as would *justly* prevent restitution by the *French*. If such a case could be supported, I will admit there might then be just grounds for resorting to the *British* captor for indemnification; but, till this is proved, the responsibility which lies on re-captors to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors.

What then has been the nature of these irregularities?—It is said, that the masters and proprietors were sent away from their ships; and, therefore, that there was no one to apply for restitution at the time of recapture: But what was there to prevent them from making these applications afterwards? Are the *French* more than the *English* courts exempted from making subsequent restitution? They hold, indeed, that possession of twenty-four hours will convert the property of prize; but this is not applicable to a neutral vessel: so strongly did the maritime jurisprudence of ancient *France* consider neutral property to be in a state of absolute inviolability, that no salvage was allowed, on retaking neutral vessels, on the supposition that no service had been rendered to them. Such was the language of their law; and, therefore, no bar to restitution can have arisen from the impossibility of making immediate application.

It is said farther, that the papers were all thrown confusedly together; by which it was put out of the power of the claimants to produce that proof and those documents which the courts of *France* require.

I know it was a maxim of the *French* law, and a maxim not deficient in justice, that if in time of war a ship

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a ship is found sailing about the world without any credentials of character, she is liable to confiscation: but if a just reason could be given for this defect; if accident or force could be shewn to have stripped her of these documents, can it be conceived that the general rule would be applied to such a case? Unless the courts of *France* have renounced every principle of justice, such a consequence could not have ensued from the want of documents in these cases; and, therefore, it is not in reason to be presumed. Supposing these irregularities to have existed, and in the censurable degree which this argument imputes to them, they have not in any manner taken off the obligation which the *French* lie under to restore this property. I must determine that they would not, under any proceedings of justice, have prevented restitution from the *French*.

On no other ground can the proprietors be entitled to claim it from the *British*. If the neutral has sustained any injury, it proceeds not from the *British*, but from the *French*; and there is no reason that *British* captors should pay for *French* injustice. I must pronounce *the protest* to be well founded, and the captors to be discharged from any farther proceedings.—

Laurence said there was a quantity of silver on board which had not been retaken.

King's Adv.—After what has fallen from the Court, I cannot object to the restitution of the specie.

June 22, 1799—This cause was re-heard before the Lords of Appeal. The sentence of the Court below was affirmed, and costs were given against the appellant.

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The purchase of an enemy's vessel in time of war, is liable to great suspicion: the suspicion is increased when the asserted neutral purchaser appears to be personally residing in the enemy's country at the time of sale. *Defect of proof. Condemnation.*

THE BERNON, DUNN Master.

THIS was a case of a ship and cargo ordered for farther proof on a former day.

JUDGMENT.

Sir *W. Scott*—This is a ship asserted to have been purchased by an *American*, in *France*, during the war: such purchases, have been allowed to be legal, but they will always be obnoxious to much suspicion: the Court will always feel it to be its duty to look into them with great jealousy, and it will do this strictly, even in purchases made under commission, for neutrals resident in their own country. But the suspicion will be still farther increased, and the Court will exert its utmost power of research, where it appears that the pretended neutral purchaser was a person then resident in *France*; for the Court cannot be ignorant of the necessity which the *French* have felt of covering their trade, nor of the system of collusion practised for that purpose: but still greater suspicion will arise, if the ship, so purchased, immediately engages in the commerce of *France*, and continues in the hands of the *French* proprietors.

Attending to these considerations, let us examine this purchase, asserted to have been made at *Bordeaux*, in *May 1796*, by a person then in *France*, by *Mr. Dunn* the present master: and let us see what has been her employment:—she had made one voyage before this, according to the master's account, from *Bordeaux* to *Hamburg* with wines; a destination perfectly neutral, although not, as we might naturally have

have expected, to her own country: But is this true? All the other witnesses say, "they went from *Bordeaux* to *Brest*," and this account also confirmed by what appears in a paper found on board.

Now I ask, this fact being proved, that she was engaged in the navigation of *France*, to a port of naval equipment, with supplies, to the nature of which I cannot be inattentive; What is the consequence? It leads immediately to this conclusion, that the master is a person discredited, and not entitled to any belief; for it is a point on which he could not err by mere mistake. It cannot be said here, (as it is sometimes said,) that he was ignorant of the language in which he was examined. *English* is his vernacular tongue; and when he swears that his last voyage was to *Hamburg*, he swears to that which he knows to be false.

The employment of a vessel is, *in limine*, a point very proper for inquiry; for it may impress a national character, and must at all events in such a case as this very much elucidate the transaction.—As to the property,—one witness, Mr. *Alliston*, says, "he believes *Chanon*, a person at *Bordeaux*, to be the owner, because he came often on board, and acted as owner; and because, on the misbehaviour of a Lascar sailor, complaint was made to Mr. *Chanon*." Other witnesses "believe *Dunn* to have been the owner;" but they give no reason for their belief.

The documents were deficient: there was no bill of sale; the vessel had been a prize ship; yet there was no proof of condemnation. The only documentary evidence that was on board, was a certificate

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of property, on oath, before the *American* consul, Mr. *Fenwick*, a person whose office is highly respectable; but men in office must themselves respect the duties of that office, if they mean that it should entitle them to the respect of others; and it has appeared in some cases, that Mr. *Fenwick* has not been always very correct in the recollection of this important truth. So circumstanced, the case originally stood very naked of proof; and the Court gave the parties an opportunity of bringing farther evidence both as to the national character and the property of the vessel.

Now, 1st, wherever it appears that the purchaser was in *France*, he must explain the circumstances of his residence there: the presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it; and 2dly, To satisfy the Court fully on this business, the claimant ought to be prepared to meet the presumption which arises, as to the property, on the face of the transaction; and which is confirmed by the evidence of Mr. *Alliston*. This he was bound to accomplish. In what manner is it performed? He swears "that he resided "at *Boston* fourteen years, when at home;" but he does not say how often he had been at home: he then states, "that being at *Bordeaux* in 1796," &c., but he does not say how long he had been there: he might have lived there a long time. The *onus probandi*, I have said, lay upon him; and the presumption is not rebutted by the asserted residence of his wife and family at *Boston*. It is said, his wife lives in *America*: but he may have been in *Europe* during the war, engaged

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engaged in the trade of *France*; and if so, such an occupation would supersede his pretended neutral character.

The account then states, "that part of the purchase-money was paid, and the rest was to be paid on his return from his first voyage." This is represented as an excuse for his return to *Bordeaux*; to which place he was to return, whether he obtained a freight or not: but his return appears not to have been for one time singly; and, besides, it cannot account from his strange deviation from truth in his depositions. "On his return to *Bordeaux*, he brought some papers on board from his lodgings;" so that he appears to have had a continued residence there during the interval of his voyages: under these circumstances, I cannot say I am satisfied. I do not mean to lay down so harsh a rule, as that two voyages from *France* shall make a man a *Frenchman*. I do not say that. But this claimant being called upon for farther proof, and having an opportunity given to him of making out his case in a satisfactory manner, I must say he has not done it.

With respect to the sale, the evidence produced consists only of a formal bill of sale, in which *Chanon*, the person mentioned by Mr. *Alliston*, is the vendor; and of a note given by the master to pay part on his return, and of a receipt. How are these verified? It is said, "by the signatures of *American* houses." All that they attest is, that their signatures affixed are true; but, as to the transaction, they do not take upon themselves to verify that. It is not my business to say what precise proof a man is to bring to verify a purchase: but it might have been some satisfaction if

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the *American houses* had certified their belief of a *bond fide* transaction. The claimant might have shewn his funds. I do not know that the enemy vendor's attestation might not have been received; *valeat quantum valere potest*; or there might have been some negociation shewn. As it is, it all stands on Mr. Dunn's affidavit: and when I look back to his mis-statement of the destination, I cannot say that he makes full faith for such a public instrument.

I need not look to the other part of the case, to the employment of the vessel: I am disposed to give him the benefit of the admission, that the employment of this vessel would not be sufficient to bind upon it a *French* character. What shall I do then? Shall I order farther proof? It is enough to have permitted it once, the party having had a full opportunity of proving his claim, and having failed to satisfy the Court, it is time to shut the door.

With respect to the cargo, the Court must have farther satisfaction. In the original evidence, there was a bill of lading, expressing account and risk of the claimant. One witness says, " *Peters of Bordeaux* " was the lader, and that the goods were to be de- " livered at *Hamburgh* for his account and risk, as " he believes: that *Peters* said to him, when he ex- " pressed fears that it might be *French* property, it " was *bis*, and he was as good a neutral as himself." This is the account of one witness; and there seems to be no reason to induce him to swear falsely. Another witness, Mr. *Allison*, believes the cargo was to be delivered at *St. Malo*es.

The proof now produced is such as, it is said, would be held good in ordinary cases; it consists of attesta-

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attestations, letters of orders and advice, invoices, and bills of lading: but in cases so particularly circumstanced, something more must be required: it is possible that there might be such documents as these if the transaction was fictitious. There is a reference made to a letter of the 25th of June: I have a curiosity to see that: the insurance would throw some light on the destination: if there was none made, *that* may be certified.

The
BRONX.

Dec. 19th,
1793.

Ship condemned. Farther proof ordered, of the cargo.

The King's Advocate prayed—That there might be attestations of the confidential clerks.

Court—I have no objection: it is a case loaded with suspicion.

THE DANCKEBAAR AFRICAAN, SMIT
Master.

Dec. 19th,
1793.

THIS was a case of a Dutch ship, bound from Batavia to Holland, and taken on the 16th of November 1795. On coming to the Cape of Good Hope, a claim was given on the part of Goetz and Vos, inhabitants of the Cape, and then become subjects of the crown of Great Britain. The cargo had been delivered to them on bail to answer adjudication.

Property sent from a hostile colony cannot change its character in transit, although the owners become British subjects by capitulation before capture.

For the Captors, the King's Advocate—This is a ship going from Batavia to Holland, and claimed by merchants at the Cape. The evidence of property is not full; but the principal question is, Whether, allowing the property to be proved, the claimants, can

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The
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Dec. 39th,
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can receive any protection, as to this part of their property, from the capitulation under which they became *British* subjects, *September 15, 1795.*

The ship sailed from the *Cape* the 21st of *May 1795*, and was taken on the 6th of *November*. She sailed in a hostile character, and under the authority of a well known case in the last war, *The Negotie en Zeevaart*, it is now clear that a ship cannot change her character *in transitu*.

On the 21st of *May* it must have been known at the *Cape* what was the state of *Holland*: that the *Stadholder* had left it, and that the country was in possession of the *French*. The ship was dispatched as a *Dutch* ship, with directions to make a vigorous resistance against cruisers; that is, as it must have been meant, against *English* cruisers. With respect to the intermediate capitulation, *September 15th*, nothing is more clear, than that the general articles, protecting the property of inhabitants, apply only to such property as is then within the colony, and not to any other which they may possess elsewhere. On the surrender of a colony, all property devolves to the conquering power. The protection arises as exceptions under capitulation; and it is not to be extended beyond the terms of the articles.

The inhabitants do not stand, as *British* subjects in all respects: they are under no obligation to continue there, nor are they obliged to serve in our fleets or armies: they are protected only in possession of their property, and no farther. The terms of capitulation in the case of *De Negotie en Zeevaart*, were as favourable as in this case, and indeed stronger. The authority of that case is conclusive; and under

it this ship and cargo are subject to immediate condemnation.

For the Claimant, Laurence—The principles which have been laid down, that, although a colony surrenders, and the inhabitants swear allegiance to the crown, yet all the property belongs to the crown which is not particularly protected, are principles of a very dangerous nature. On conquest, all belongs to the conquering party: but when subjects come under protection, the property which is not seized, remains quiet; and it is not to be pretended, two or three months afterwards, that this or that part of their property was not on the spot at the time; and, therefore, that it may be seized and confiscated. The 5th Article of the capitulation states, “all private property of civil or military servants of the colony, churches, &c. shall remain free and untouched.” On capitulation, and on taking the oath of allegiance, a colony is supposed to acquire generally the right of *British* subjects.

The case of *The Negotie en Zeevaart* is distinguishable in many points from the present case. This property was dispatched in *May*, whilst *Holland* had not ceased to be an ally of this country. *France* had taken possession in *January*; but still this country did not think it expedient to declare hostilities, and the real character of the two countries remained dubious. Shall persons who dispatch vessels, supposing themselves to be allies at the time of sailing, and being actual subjects at the time of capture, become liable to confiscation by reference to intermediate time? It by no means follows from any thing which was laid down in the case cited, where all that was determined

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determined was, that colonies in a state of actual war cannot, by an intermediate capitulation, protect property which they have dispatched in their hostile character, and to the Mother Country still hostile. The property in *that* case was going to *Holland*: in *this* it was to have come first to the hands of these claimants, and would have been detained by them from passing into the hands of the enemy, on its ultimate destination. In *that* case the destination being to the enemy's country, was a trade which became illegal as soon as the owners assumed the character of *British* subjects, so that they could not claim either in their old or in their new character. In *this* case, the trade would have been divested of any illegal destination: if the property had got to the hands of the claimants, it cannot be contended it would not have been protected. It was, besides, another particular circumstance in *The Negotie en Zeevaart*, that at the time of adjudication, *Demarara* was again become a *Dutch* colony.

The King's Adv. in reply—There seems no reason to alter or limit the assertion, that all property in a captured colony is confiscable; that exceptions are to be carried no farther than the terms of the stipulation; and that all other property may be seized, when an opportunity of seizing it offers. No real distinction has been taken: the inhabitants of the *Cape* could not be considered as in alliance with this country in *May 1795*: hostilities *de facto* had existed before that time, and the declaration was suspended only to give an opportunity to those who chose to leave *Holland* and its dependencies to withdraw: these persons remained in the country, and are therefore to be

be considered as enemies: if the capture had been made before the *Cape* capitulated; if it had been made *September 14th*, there could then have been no doubt but that the property would have been liable to confiscation. The authority of *The Negotie en Zeevaart* shews, that property not expressly included in capitulation is subject to confiscation.

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DANCKEBAAR
AFRIKAAN.

Dec. 19th,
1788.

JUDGMENT.

Sir *W. Scott*—I am of opinion that this is a decided case on the authority of the Supreme Court in *The Negotie en Zeevaart*: I remember that case well, having been junior counsel in it, and having attended much to it; as there was much difference of opinion respecting it in the court below.

It was a case of a ship sailing from *Demarara* to *Middlebourg* in *Holland*, on the 30th of *January 1781*, about six weeks after the declaration of hostilities against *Holland*. *Demarara* surrendered to the *British* forces on the 14th of *March*; and the capture was made on the 25th.

The terms of capitulation were very favourable: “the inhabitants were to take the oath of allegiance; to be permitted to export their own property, and to be treated *in all respects* like *British* subjects, till his Majesty’s pleasure could be known;” and although this was in the first instance only under the proclamation of the captor, still that being accepted, it took complete effect. These terms were afterwards confirmed by the King: there was, therefore, in that case as strong a promise of protection as could be; and recognized and confirmed by the supreme authority of the state.

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Under these circumstances, the Judge of the Admiralty thought the claim so strong, that he actually restored and it was not *his* opinion alone.

On appeal, however, the Lords were of opinion that property sailing after declaration of hostilities but before a capitulation, and taken on the voyage was not protected by the intermediate capitulation: it was not determined on any ground of illegal trade nor on any surmise, that when the owners became *British* subjects, the trade in which the property was embarked, became, *ex post facto*, illegal: nor was it at all taken into consideration, that Demarara had again become a *Dutch* colony at the time of adjudication. It was declared to be adjudged on the same principles as if the cause had come on at the time of capture. It was not on any of these grounds, but simply on the ground of *Dutch* property, that condemnation passed in that case. I remember a *dictum* of a great law Lord then present, Lord *Cambden*, that the ship as *Dutch*, could not change her character in transitu."

This decision of the Supreme Court must be binding on me, unless there are in the present case any distinctions that take it out of the law of that decision. The distinctions made, are; 1st, that the colony in this case was not hostile; and, 2dly, that the ship was not going into the hands of the enemy, but that she was coming first to the *Cape* into the hands of the owners, now become *British* subjects; and that they would have altered the ulterior destination to *Holland*.

On the first point; that *Holland* was not hostile, it is enough that hostilities have since followed, and with a retrospective operation. The state of affairs was at

that

that time at best but very doubtful ; and all property taken during that doubtful state of things has been since condemned : but it is said, that although *Holland* has become hostile, the *Cape* has not. If it could be proved that the colony adhered to the old government, it might entitle them to be exempted from this hostile character ; but that is not shewn, and there is no reason to presume it. They surrendered as *Dutch* subjects ; and, therefore, there is no pretence now to contend for a different character.

The other distinction is, that this property was coming to the hands of the owners, whilst in the *Demerara* case it was gone from them, and must have fallen into the possession of the Mother Country : but there is no decided proof that this ship was coming to the *Cape* : and if so, she is still to be considered as taken merely *in transitu* towards *Holland*, where the voyage was clearly to have ended ; and in what character ?—As a *Dutch* ship, in a *Dutch* port. If the vessel had arrived at the *Cape*, I will not say, that coming actually into the hands of the capitulants, she might not have been protected as property in possession ; but being taken before she arrived there, as *Dutch* property, I am bound down by the decision of the Lords ; and I think myself obliged to say, that her character could not be changed *in transitu* ; and that she must be condemned as *Dutch* property.

The
DANKEBAAR
AFRIKAAN.

Dec. 18th,
1792.

THE HERSTELDER, DE KOE Master.

July 15th.
1799.

Hostilities against the Dutch, declared the 15th of September 1795, are applied retrospectively to property taken during the doubtful state of things that preceded the declaration. A surrender by capitulation, is not the voluntary withdrawing required by the proclamation to the Dutch.

(a) *Supra*,
p. 107.
Lords, July 18,
1792.

THIS was a case of a nature similar to the *Dankebaar*, but differing materially in the dates of some parts of the transaction. It is reported out of the regular order, as it may serve to shew more distinctly the principles which were applied to property in this very particular situation. The cargo in this case was shipped in February 1795: and captured on the 27th of August. The declaration of hostilities against Holland issued on the 15th of September 1795, and the surrender of the Cape to the English forces was on the 16th of the same month.

For the Captor, the King's Advocate—submitted, that this case stood exactly on the same principle as *The Dankebaar Africaan* (a) and *The Negotie en Zeevaart*, and must follow their fate.

For the Claimant, Laurence and Robinson—for a second *Claimant, Arnold*—contended, that this case was distinguished from the *Dankebaar* by these circumstances; that this vessel was taken previous to hostilities; that in fact there was only one day of hostility between the sailing and the adjudication, the 15th and 16th of September; but that the negociation for the surrender had commenced on the 14th; and, therefore, in justice the inhabitants were entitled to their indemnity from the commencement of it. It was said also, that *The Negotie en Zeevaart* was in its principle in favor of this claim: for if there was any justice in the principle on which it was decided, “that where a shipper changes from enemy to friend after sailing, “the character of his vessel cannot be changed in “transitu,” there appeared to be no other reason why

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it should not be applied *& converso*, except that in common cases, where shippers change from friends to enemies, you cannot restore without throwing away property into the hands of an actual enemy: but this case being so peculiarly circumstanced as to obviate that objection, was formed to try the soundness of that principle as a maxim of law; for as the colony was clearly friendly at the time of sailing, hostile only doubtfully, and by construction at the time of capture, and actually subjects at the time of adjudication, restitution might safely pass, and should pass, on the very principle *that the character cannot be changed in transitu*. It was farther contended, that the character of the person was to be considered only at two points of time, at the time of seizure, and of adjudication: that if he was capable of restitution at these times, he was not to be disqualified by intervening circumstances; or if a change could operate to his disadvantage, the return of things to their old state intervening also, ought to operate again to his advantage.

JUDGMENT.

Sir *W. Scott*—This question arises on property placed under very particular circumstances: it is property belonging to persons at the *Cape of Good Hope*, and seized before the commencement of hostilities: hostilities afterwards ensued; and by capitulation the *Cape* and its inhabitants were taken under the protection of *Great Britain*. The question is, therefore, Whether the parties are entitled to recover this property under the capitulation?

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HERSTELDER.

July 8th,
1799.

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1799.

The general rule certainly is, that personal property follows the rights of the person ; that if at the time of seizure he is entitled to restitution, and if at the time of adjudication he is in a capacity to claim, he must be entitled to restitution : but though this is the general rule, it may be liable to be altered by particular exceptions. Distinct characters may be affixed on particular parts of property, which may make them liable to be treated in a different manner from the general property of the same person.

Two cases have been cited on this subject as conclusive precedents ; *The Negotie en Zeevaart* was a case of no inconsiderable diversity of opinion : In that case the property was shipped subsequent to the declaration of hostilities ; but the colony was entirely ignorant of it at the time of sailing : the ship was taken navigating under the *Dutch* character ; but a capitulation had intervened, in which the colony was declared to be in all respects on the footing of *British* subjects. The Lords determined, that the ship sailed as a *Dutch* ship, and could not be altered *in transitu*. *The Dankehaar Africaan* was a ship that sailed before hostilities, but was not taken till after the surrender of the *Cape*, under a capitulation for the protection of property. In that case the ship sailed before hostilities, and if the state of *Holland* had been in a clear and decided character of amity towards *Great Britain*, I should have held, that the party would be entitled to restitution, and to the benefit of the principle—“ *that the national character cannot be altered in transitu.*”

But it is to be remembered that this was not the state of *Holland* at that time. Though we speak of the decla-

declaration of hostilities as issuing *September* the 15th, it must be kept in mind that the state of *Holland* was very ambiguous for several months. Subsequent events have retroactively determined, that the character of *Holland* during the whole of that doubtful state of affairs, is to be considered as hostile; and that the property of *Dutch* subjects seized under it, is to be treated as hostile; and although the declaration of hostilities has made this difference, that it gives the individual captors a right in the capture instead of the Crown; that is a domestic regulation only, and makes no difference with respect to the admission of the claim of former owners.

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HERSTELDEE.

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1799.

In the present case the property sailed before hostilities, that is, before the declaration; for I must always keep in mind that actual hostilities are not to be reckoned only from the date of the declaration; but that the declaration has been applied with a retroactive force. This ship then, sailing before the declaration, but during the ambiguous state of affairs, is to be treated as all other *Dutch* property taken at that time: I cannot distinguish either to its advantage or disadvantage.

It is only to be inquired then, whether the parties have brought themselves under the terms of the protection which was held out to them: the proclamation held out an invitation to all who would leave *Holland*, and withdraw themselves to *Great Britain*, or to any other neutral country, that they and their property should be protected. All who accepted these terms, were certainly entitled to a liberal construction of them: and if a person in a distant colony had, with-

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—
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out knowledge of the proclamation, acted on the principle of it, out of affection to the old government of his own country, or out of dislike to the present government of *France*; I should have held, that such a person would be entitled to the benefit of the proclamation, although he had acted under entire ignorance of it.

If that could be made out in this case, I should decree restitution: but how does that fact stand? A great force was sent from this country to try the inclinations of the *Cape*. The invitation was made in the name not only of *Great Britain*, but of the *Stadholder* also; but it was rejected. Military operations were then commenced; and the matter terminated in a forcible surrender to the *British* arms. Nothing could be more different from an act of *voluntary surrender*. As to the distinction which has been made between the acts of the government and the private inclinations of individuals, it cannot be admitted, unless indeed it was supported by very strong proof; and unless some very clear overt acts could be shewn to prove such a difference of inclination. The disposition of individuals is to be considered as bound up in the acts of the government of their country: I will not say that such a principle can admit of no exception under any possible circumstances; but it is a principle not lightly to be departed from, that the inclinations of individuals are to be considered as bound by the acts of their government.

If I am right in considering the property in this case, in the same light as other *Dutch* property taken at that time, it must follow the same course. I am aware, this is to act on a principle sufficiently strong;

strong; but it is one that has been laid down by the Superior Court; and, therefore, it is one that I am undoubtedly bound to obey: although I have no scruple to declare, that it is a principle which I am not disposed to carry a step farther than authority leads me.

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August 2d, the Court expressed great dissatisfaction at finding that this vessel had been described as lying at *Plymouth*, when, as it appeared, she was taken on capture to a port of *Norway*, and lay there at the time of adjudication: the Registrar was directed to annul the decree; the Court declaring that it would not condemn a vessel lying in a neutral port.

THE CONCORDIA, WISE Master.

Dec. 20th,
1798.

THIS was a case of a vessel laden with tar, pitch, and deals; and taken on a voyage from a *Swedish* port to *Genoa*, on the 30th of *July* 1798.

The ship and cargo were claimed as the property of merchants in *Sweden*.

JUDGMENT.

Sir *W. Scott*—This ship was taken under *Swedish* colours, on a voyage, as it is stated, to *Genoa*: the master, in his depositions, describes the ship to be the property of a *Swedish* subject: the cargo consists of tar, pitch, deals, and other articles, the produce of *Sweden*, the property, according to the master's evidence, of a *Swedish* subject, and going to *Genoa*; the papers confirm this account both as to the property and the destination.

An alternative destination should be expressed in the ship's papers: masters must not conceal any papers, least of all their instructions.

Restitution.

The
CONCORDIA.

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1798.

It follows therefore, that unless the depositions or the papers can be effectually discredited, we must consider this ship and cargo as the property of neutrals, sending the produce of their own country to a neutral port; for *Genoa* was not at this time in a state of avowed hostility with this country: it is true that a voyage of this sort wears no very favourable complexion; as it is notorious, that *Genoa* was at this time very friendly to *France*, obedient to *French* rulers, who had overturned the old government of the country, and created a new one more subservient to their designs. The docks of *Genoa* were employed in the repair of *French* ships of war, whilst their port was shut against *English* cruisers, and for this conduct hostilities were soon afterwards declared against that government.

This was the fact:—at the same time, I must say, that in point of law, this could not be considered as an enemy's port. The question then is, whether the evidence in this case is so discredited as to oblige the Court to condemn, or to require farther proof? The papers all point to *Genoa*; the master deposes to that destination, without mention of any other; but other papers have been introduced. The claimants have since brought in an affidavit of the master, introducing a letter from the owners to Mr. *Cowie* (a merchant of this town, and their agent here); and also the owner's letter of instruction to the master: these shew that the master had an option to come to *England*: there was an alternative destination. So far I go along with the captors, that this ought to have been disclosed in the papers and depositions: wherever there is an alternative destination, it ought to be stated at first; but at the same time

time I cannot say, that it was such a fraudulent act, or so vicious a suppression, as materially to affect the master's credit.

Another circumstance pointed out against the master is, that he withheld his instructions till the time of examination. This was certainly incorrect: it is a master's duty to produce all his papers; and least of all, to withhold his instructions, which are very important papers to be communicated for the interest of both parties; important both to the owner and the captor: but here also, as he speaks out on his examination, and as the paper contains nothing for fraudulent suppression, I cannot think this circumstance sufficient to vitiate his credit.

It is farther objected, that the papers are colorable, shewing only a destination to *Genoa*, whilst the master had a power of coming to *London*. But the situation of public affairs is to be considered: it is to be recollect, that at this time the *French* professed to seize all vessels which bore an avowed *English* destination. This is a circumstance fit to be considered, and one that takes off from the force of this objection. The letter of advice to Mr. *Cowie* confirms this part of the case, and goes far to prove that the facts were as the master has represented them; "that he had the liberty of going to *England* under particular circumstances," although his destination was to *Genoa*. If then I am satisfied that the facts of the case are as the master represents them, I must take the whole of his evidence together: notwithstanding a suspicion which has been thrown out, that he might have the same instructions to go to *France*; I must believe what he says, directly denying that suggestion.

If

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If there is nothing to affect the case from these facts, what is there in the other objection, that he was sailing under convoy? The ship was taken alone, and as far as it appears, wholly unconnected with any other. The master swears, "he received "express orders not to put himself under convoy; "that he fell in with them accidentally; kept company with them a short time, but parted, and had "not seen them several days:" I am of opinion then, that this ship and cargo are not subject to any considerations which may apply to the case of convoy. This case stands on its own grounds; the voyage to *Genoa* may be unfavourable, but I cannot say it is hostile.

As the case of a *Swede* carrying the produce of his own country, and the property of subjects of his own country, to a port not hostile,—I must restore.

Jan. 8th,
1799.

THE WELVAART, CORNELIS Master.

The purchase of vessels in the enemy's country is allowed by *England*, but a bill of sale must be produced: circumstances leading to condemnation.

THIS was a case respecting the purchase of a ship in the enemy's country.

JUDGMENT.

Sir *W. Scott*—This is the case of a ship said to have been purchased in *France*, on behalf of two persons of *Emden*; one residing there, and the other a mariner attending on the ship.

The fact of a purchase in the enemy's country is alone almost a cause for farther proof; for, considering the situation of the enemy's trade, the Court can hardly be satisfied of the fairness of such a transaction, unless the whole of it is shewn. The com-

merce and coasting trade of *France*, it is well known, are totally intercepted; and the *French* are exerting every means to regain the use of their vessels, under the cover of neutral names.

In such a situation of affairs, it must be under very special circumstances that a bill of sale would be deemed sufficient proof; but there is no bill of sale; which alone, according to the constant habits of this Court, founds a demand for farther proof.

Then what are the documents, and how are they supported?" There is a formal pass from the magistrates of *Emden*; and there is a certificate stating, "that one of the proprietors appeared before "them, and exhibited proof of his property by legal "deeds.—"

The Court is certainly bound by the law of nations to pay attention to public instruments; but at the same time it cannot overlook an impression made on it by various cases, in which it has appeared, that the magistrates of *Emden* have been victims of deception, during the war, to a very extraordinary degree: they certify also, "that the master is an "inhabitant of *Emden*," and we have seen them certifying this in cases where the persons appear never to have been there. There must therefore be a difference of opinion between us, respecting the effect of legal instruments, and perhaps these legal deeds are such as, if produced here, would not be allowed to have the same effect.

Again, it is an extraordinary circumstance that the master, though a part-owner, should not have seen a bill of sale: and that he should not be able to give a more accurate account of the price, than that

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it

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it was between 11 and 12000 livres. These circumstances deduct very much from his title of ownership.

It is a case in which we should require farther proof in a strict degree, 'if it stood on the footing of property only: but farther proof is the privilege of honest ignorance, or honest negligence, to neutrals who have not violated the law of neutrality. It is permitted to neutrals by this country to purchase ships in the enemy's country—a liberty which *France* has always denied. We certainly do allow it, but only to persons conducting themselves in a fair neutral manner, and not necessary to the purposes of the enemy: besides, this vessel appears to have been engaged in the coasting trade of *France*. The Court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile character; but, in my opinion, a habit of such trading would.

Such a voyage must, however, raise a strong degree of suspicion against a neutral claim; and the plunging at once into a trade so highly dangerous, creates a presumption, that there is an enemy proprietor, lurking behind the cover of a neutral name.

There are other circumstances in this case perfectly inconsistent with the good faith of a true neutral conduct. The bills of lading purport a false destination; and give a representation of property which is also false: they describe the cargo as to be delivered to *Noemes*, one of the claimants, and as being the property of the master; they are signed by him; he imposes on his own magistrates, and obtains a certificate from the *Prussian* Consul as to his property: yet great merit

merit is claimed for him, from the confession of the real destination at the time of capture; but it appears they were so near *St. Maloës*, that it was in vain to deny it.

Such are the facts of the case. Now there can be no principle more general, nor more solid, than that one partner shall be affected by the fraud of another. In this case the conduct of the vessel was intrusted to the master, and he is also a partner: he engaged in covering the property of the enemy from capture. Shall such a man be indulged with farther proof; loaded as he is with false papers? It is an unreasonable demand; I can have no hesitation: it would be contrary to every principle of rational justice if I allowed it.

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WELVAART.

Jan. 8th,
1799.

THE JUFFROUW ANNA, GREESON Master.

Jan. 10th,
1799.

THIS was a case of a ship, asserted to have been purchased in the enemy's country.

JUDGMENT.

Sir *W. Scott*—This is a ship, which appears by the depositions of the master, to have been an *English* prize, purchased in *France*.

There is no bill of sale on board: whoever the neutral claimant is, he must be subject therefore to farther proof. A claim has been given for Mr. *Escherausen* of *Emden*, but not till eight months had elapsed, which is an extraordinary circumstance, as he could not be so long ignorant of the capture; and although

Where farther proof is necessary by the practice of the Court; it will not be allowed to persons convicted of fraudulent conduct, or departing from a fair neutral character.

The
JUFFROUW
ANNA.

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although the Court cannot say the claimant is out of time, it has some right to enquire how it happens that there has been such neglect of ordinary diligence.

Mr. *Escherausen* claims simply for himself; but the pass, which is the only paper translated, describes the vessel to be the property of two persons: if that was the case, the claim should have been specific.— It is besides observable, that it undertakes to describe the voyage, but runs only in this vague form, from — to —. This is an omission, which I hope I shall not see again; as the destination is a very material circumstance to be known.

These are unfavourable circumstances; but independent of these, it would be a case for farther proof, as the papers are false. The master says, “ he took “ possession of the ship at *Dunkirk* :” the master’s residence was at *Ostend*; and all the crew were hired at *Ostend*: she sails to *Nantz*, and there takes in the cargo, which was on board at the time of capture: now what was the destination? It is represented by the master to have been alternative, and to have been left to his discretion, to go either to *Ostend* or *Hamburg*: but the papers represent *Hamburg* as the sole destination. To make a voyage fairly alternative, it should appear on the papers to be so; for otherwise it must mislead the cruisers of the belligerent countries, and prevent them from forming a right judgment of their case. The orders were, it appears, “ to go to “ *Ostend*, if not obstructed by *British* cruisers.”

The master was to use his best endeavour to get to *Ostend*, and only to take another destination if he should be prevented from accomplishing the first. This is scarcely to be considered as an alternative destination;

destination; and besides, *all* the papers point to *Hamburg* only. I think, therefore, there is in all these circumstances *a mala fides* in this case; and if so, the rule which I have laid down must apply to it; The party cannot be allowed to go into farther proof. It is scarcely possible that it should have been a fair transaction; a suspension of the claim for eight months, the false representation of the claimant, the direct employment of the vessel in the enemy's trade, and false papers, convince me it must be a fraudulent case; and therefore I feel no hesitation to condemn.

The
JUFFROUW
ANNA.

Jan. 10th,
1799.

THE JUFFROUW ELBRECHT, MEINTES
Master.

Jan. 10th,
1799.

JUDGMENT.

SIR W. Scott.—This ship is claimed for Mr. Ruy of Embden, who is not a *novus hospes* in this Court: he has appeared in former cases; and, if I recollect right, in *The Jonge Helena*, in which he swore the ship was his property, when it was proved in evidence that she continued the property of the former Dutch owner.

Circumstances
leading to con-
demnation.

The effect of this experience on our parts will be, not to shut the door against him, because every case is to be examined principally by its own evidence; but at the same time it would be wrong to set up technical rules against the rules of common justice and reason; and to consider him as a person whose claims in this Court do not require an investigation peculiarly strict.

Amongst

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ELBRECHT,
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Amongst the documentary evidence, there is a paper said to have been obtained on the oath of *Ruyl*: but the master to the 27th interrogatory says, "it was "obtained on *his oath*." This contradiction is not explained: *Emden* papers are but too open to the observation, that they have been in many cases obtained by fraud; and it cannot escape me, that these papers were obtained by a person who has appeared to have obtained others falsely in other cases. The question is then, Whether *Ruyl* can be considered as a *bond fide* proprietor of this vessel? The pass is granted on his oath; and it is on that also, *on that alone*, that the master founds his belief, or pretends to verify the property.

But will the *res gestae* sustain this account? The vessel is said to have passed into the possession of a *Dane* six months before the war: but it is to be remembered, that at that time the prospect of a war with *Holland* was certain. If we look to the employment, she appears to have been engaged three years invariably in *Dutch* trade: whether that alone would produce condemnation is an important question, which I am not at present called upon to decide. It is said, That would not be sufficient to fix a hostile character on the ship; but the question does not arise, as this circumstance is used, only to shew the great improbability of the asserted title.

The whole concerns respecting this vessel have remained in *Dutch* hands: the master corresponded with *Dutch* merchants;—and not at all with the asserted owner, *Ruyl*. He received all his money from them; his wife and family are resident in *Holland*; and his own occupation has been constantly in

in *Dutch* trade: nothing has happened to change in any degree his national character, but the burgher's brief obtained for him by *Ruyl*; for he does not pretend to have renounced either himself or family from *Holland*.

There is, besides, another circumstance which tends strongly to shew that *Ruyl* is not the owner. The master does not profess to be acquainted with that part of the cargo which is claimed for him: stronger demonstration could not be given, that he had no connection with *Ruyl*, but looked only to his *Dutch* correspondents as his employers.

What is there then from which the Court can infer this to be a genuine transaction, or any thing more than the superficial, shadowy business, of covering the property of the enemy?—a transaction of which the Court has seen so many instances; and some in which this very claimant has been concerned. Mr. *Ruyl's* claim, on the whole, is not supported by any evidence that can obtain credit from the Court, and therefore I reject the claim.

Condemned.

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JUFFROW
ELBRECHT.
Jan. 10th,
1799.

THE HOOP, DE VRIES Master.

Jan. 10th,
1780.

JUDGMENT.

SIR *W. Scott*—The ship is claimed for a person of the name of *Riven of Norden*, by the master, who, on his depositions, knows nothing of his employer.—It is therefore to be considered as a claim given in a general way, in discharge of his duty as master.

A case of further proof.

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The account which he gives of his appointment, is very extraordinary ; he says, " that he received at *Pinnenburg*, a parcel, with some keys, and directions to go to *Harlingen* in *Dutch Friesland*, and take possession of this ship ; he went accordingly, and found her locked up, and no person on board :" there the business begins and ends : he does not say that he has since received any letters from his owner ; or that he has any knowledge of him.—To be sure no man can be in more complete ignorance of another than he is.

Then how is the proof of property made out ? There are some ship's papers ; the first which we usually look for, is the pass, but that is granted not to the present claimant, but to other names. It is therefore absolutely impossible to restore on this evidence : it cannot be.—It is however suggested, that *Riven* may be a member of a house of trade ; or that there may have been a subsequent transfer : if so, it was their duty to obtain another pass. A general pass is a thing not to be admitted : and it is not to be said, that it is immaterial whether it be granted to *A.* or *B.*, if the real interest is neutral. A pass should describe, explicitly, one of the partners of a house of trade at least.

Possession appears to have been taken at *Harlingen*, from which a presumption arises, that the ship was *Dutch* property ; the destination also is unfavourable. The mariners' contract binds them to return to *Holland* :—the depositions state *Emden*.—But the ship was taken far out of that course, and the excuse is, that she was driven out by contrary winds.—This is very equivocal. But there happens

to be a prior pass on board, describing her as a *Norden* ship; this is slight evidence to shew that she belongs to that port. In consideration of this favourable circumstance, however, slight as it is, I shall allow this case to go to farther proof; but I shall expect *strong proof*; and a full explanation of all these strange appearances, accounting for the mode of taking possession, and for the informalities of the pass.

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Farther proof ordered.

April the 20th this ship was condemned, no farther proof being produced.

THE TWO BROTHERS, McCLOUSKY Master.

Jan. 11th,
1799.

THIS was a case of a ship asserted to have been purchased in the enemy's country.

JUDGMENT.

Sir *W. Scott*—This is a ship said to have been purchased in *France*, by *Walter Seaman*, an *American*, in *December 1795*: since that time she has been uniformly employed in *French* commerce: she has never gone into a neutral harbour, much less to any port of her new country.

Suppression of papers is not a cause of condemnation in *England*; but it raises great suspicion—parties will not be allowed to say that they were only private papers. Circumstances leading to condemnation.

Seaman was at the time resident in *France*, a circumstance which, the Court has had frequent occasion to remark, strongly increases the suspicion; as the detection necessarily becomes more difficult: the continuance of the former trade raises a strong presumption of a continuance of the former interest: these are general

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circumstances extremely suspicious, which it was proper to notice before I descend to the particulars of this transaction.

Of the documentary evidence, the only paper relied on, is the bill of sale; but that is entirely unauthenticated. Payment was to be made by bills of exchange, which are not proved to have been ever paid: and considering the length of time, there is great reason to suspect it was only a paper-contract.

The pass was obtained according to the master's deposition, "on his oath:" but the instrument itself is not in unison with this account; for it purports to have been granted on the personal appearance and oath of *Seaman*.

Who is Mr. *Seaman*? He is said to be an *American*, who has obtained restitution from this Court in other cases. If he appeared in those cases in a pure *American* character, he was certainly entitled to it: but it does not therefore follow, that the national character which entitled him to restitution in one transaction, entitles him to it in all. A man may have different national characters, according to the course of different transactions; and it is my business to examine the present claim by its own particular circumstances.

The master states in his depositions, "that *Seaman* is an *American*, but he does not know where he resides." We might have expected that there would have been some correspondence between them, if there had been any real connexion:—but it is not so: and no master can be less connected with his owner than this man seems to have been. On this view, I should find no great difficulty in declaring what

what would be the legal effect of such a transaction if the case required it. If a man goes into a belligerent country, and remains there four years, employing himself and his property in *French* trade, it will not be easy to take him out of the description of a merchant of that country, as to his property so employed.

But the ground on which I shall determine this case, is that the *res gestae* do not convince me that *Seaman* had any interest in this vessel; for, if he had, it is impossible that he should have turned his back upon her in the way he did; and that he should have left her in the possession of this man, with such an absolute estrangement between them: it is so contrary to the common manner of acting towards property, that I cannot think it deserving of any credit.

So much for the papers. Then what is the subsidiary evidence? The master "believes *Seaman* to be the owner, because he told him so."—This is a very slight ground of belief, to prove the validity of such a sale. There is no mention of directions, nor of accounts; nor of any thing confidential passing between them; besides, the master is entitled to less credit, from a circumstance which came out on the examination, "that he burnt some letters before capture."

These, it is said, were only the private letters of some women:—Now, no rule can be better known than that neutral masters are not at liberty to destroy papers; or, if they do, that they will not be admitted to explain away such a suppression, by saying, "they were only private letters."

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thers.

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1789.

The
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thers.

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1793.

In all cases it must be considered as a proof of *mala fides*; and where that appears, it is an universal rule to presume the worst against those who are convicted of it: it will always be supposed that such letters relate to the ship or cargo; and that it was of material consequence to some interests, that they should be destroyed.

Besides, the fact does not come out, on the master's deposition, with great frankness: it is added, by interlineations afterwards, when this circumstance had been disclosed by another witness, whose credit has been attacked: but I think the master's confession of this fact, made in this manner, confirms the credit of the witness who mentions it; and if it were necessary to choose between the two, I should not hesitate to prefer the testimony of that witness. The mate also suppresses the circumstance; and as it is one which he could not but know, it is a suppression which very much impeaches his credit also. Looking to all these circumstances; to the want of proof of purchase; and to the mode of payment: seeing that the master is in a great measure discredited: from the whole complexion of this case, I am of opinion, that the asserted transfer never took place: and therefore I reject this claim.

THE FLAD OYEN, MARTENSON Master.

Jan. 16th,
1799.

THIS was a case of an *English* prize ship carried into a neutral country, and there sold, under a sentence of condemnation by the *French* consul.

The claim was given on behalf of the purchaser, a *Danish* merchant.

The King's Advocate having opened the general circumstances of the case,

The Court said—This is a case in which I must call on the counsel for the claimant to begin.

Arnold and Sewell—The title to this vessel can scarcely be called in question on any doubts respecting the property, or the actual transfer. There are all the usual proofs of property on board; and the transfer is described to have been made in the most open manner, by public auction. The only ground on which it can be disputed, therefore, must be on the legality of such a sale; and, for that purpose, it is contended that a sentence of condemnation is essential to the transfer of prize ships; and that a legal condemnation did not pass on this occasion: but it is no where appears what are the forms and circumstances necessary to make this a legal act. A condemnation took place, and under the person delegated by the *French* nation, to exercise this function. There is no reason to contend that the name and process of an Admiralty Court are necessary, as long as the proceedings are held under the public authority of the belligerent country, and are conform-

An *English* prize ship taken to *Bergen*, condemned there by the *French* consul and sold, is not deemed to have been legally condemned in a neutral country. The ship restored to the former owner on salvage.

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able to the law of nations. In the present war, 23d of November 1795, there was the case of *The Maddison*, a ship condemned under a sentence of the *Beaureau de Commerce* at *Bordeaux*, in which the condemnation was held good. 12th of April 1796, there was the case of a ship condemned by the representative of the *French* nation, as commissary, attending the *French* armies in their irruption into *Holland*. In point of form, it cannot be said the present instrument is defective: it asserts the nature of the authority under which it passed—the decree of the *French nation*; and then details fully the usual and regular proceedings. There seems to be no reason why it may not take effect in a neutral country, provided it be done with the permission of that government. In this instance the condemnation was in the most public manner: the sale was in the Chancery of the country,—and a *Danish* pass was immediately granted, as for a *Danish* vessel. It is enough if the captor carries his prize into a place of security; and a neutral port has been expressly held to be sufficient for this very purpose, in books of great authority. *Conf. del Mare* 287. *Vattel*, b. iii. c. 7. sect. 132.

The practice of our own country also has in many instances proceeded on this principle. *English* captors have taken their prizes into *Lisbon* and *Leghorn*; and condemnations have passed upon them lying there. In the last war, they carried them to *Nice*: and there was an instance of a ship, *The Favourite*, carried into this very port of *Bergen*, and condemned. On these grounds it is submitted, this practice cannot

not be impeached as illegal: and the claim to the property in question, transferred under it, must therefore be admitted.

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JUDGMENT.

Sir *W. Scott*—This is the case of a ship taken by a *French* privateer, and carried into the port of *Bergen* in *Norway*, where it appears she underwent a sort of process, which terminated in a sentence of condemnation, pronounced by the *French* consul; and under that sentence, she is asserted to have been transferred to the present neutral proprietor.

The sale was conducted by public auction: but it appears that the very person who was the purchaser in that case, was likewise the actual seller, and stood in the capacity of general agent, at this place, for the *French* nation. The ship was put up to auction: there was no bidder whatever, and she was purchased by himself, under the denomination of *agents*.

Now, from the ambiguity of these expressions, the presumption on the face of such a sale would be, that he purchased her in the same character in which he sold: having sold as agent for the *French*, he might be considered as having bought also for the *French* proprietors, who carried her into that port. The utmost that the Court could do in such a case, would be to allow farther proof; in order to see in what character he made the purchase, whether *propto nomine*, or as agent.

It appears that this ship was sent immediately to *France*, which of itself colours the nature of the purchase, and shews it could not be for a mere *Dane*, and for *Danish* commerce; but on behalf of persons

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persons resident in *France*: it appears likewise, that he sent this vessel with papers for the island of *St. Martins*; but in fact gave *verbal* directions to the master to get into the port of *Havre*, if he possibly could. Now, from the depositions of the master, I think it was entirely within the knowledge of the pretended purchaser, that *Havre* was a blockaded port: he orders him "to get into *Havre* " *de Grace*, and land the goods, if it be possible; "but in case he should be prevented from so doing, he was then to go to *St. Martins*, and land "the goods there." I think it sufficiently appears, under these circumstances, that the vigilance of *British* cruisers was, if possible, to be avoided; and that there has been a fraudulent intention to break the blockade, which at that time was actually existing.

All the papers on board differ from the actual proof; because they represent *St. Martins* as the primary port of destination, whilst it was in fact to be the *dernier resort* only, in case he could not effect his attempt to get into *Havre*. Under these circumstances, I am of opinion that this does amount to that fraudulent conduct on the part of the purchaser, which would debar him from the advantage of farther proof: and taking all the circumstances together, I am of opinion that it was no actual transfer, but that the ship remained the property of the *French* captors, and was going to *France* to be put into their possession; and therefore upon that part of the case I should have very little doubt in pronouncing a sentence of condemnation.

But

But another question has arisen in this case, upon which a great deal of argument has been employed; namely, Whether the sentence of condemnation which was pronounced by the *French* consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bona fide* made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of *England* to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in *Europe*, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia*: the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize,

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it should appear also that she has been, in a proper judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country: in my opinion, if it could be shewn, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient; that would not be enough; more must be proved; it must be shewn that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation: it is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent: and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress: thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other, modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not

not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country; I must take my stand on the ancient and universal practice of mankind; and say that as far as that practice has gone, I am willing to go; and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to treat the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage upon the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me, that it is the duty of this Court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion.—But even if we look farther,

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farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained: proceedings upon prize are proceedings *in rem*; and it is presumed, that the body and substance of the thing is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem*, being cases of condemnations of *British* prizes carried into the ports of *Lisbon* and *Leghorn*: but in those the condemnations were pronounced by the High Court of Admiralty in *England*. The only cases are of two ships carried into foreign ports, and condemned in *England* by this Court; the very infrequency of such a practice shews the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to *Lisbon* and *Leghorn*, it has been said, that if the courts of *Great Britain* venture this degree of irregularity, other countries have a right to go farther. That consequence I deny: the true mode of correcting the irregular practice of a nation is, by protesting against it; and by inducing that country to reform it: it is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations; and is at liberty to assume as much as it thinks fit.

Upon these ports of *Lisbon* and *Leghorn* it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to *British* ports & the *British* exist

exist there in a distinct character, under the protection of peculiar treaties ; and with respect to *Portugal*, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally : to be sure no covenant can have more the effect of giving the ports of *England* and *Portugal* a reciprocal relation of a very peculiar sort—to make the *British* ports *Portuguese* ports, and the *Portuguese* ports *British* ports to a certain degree. Now, unless I am given to understand, that peculiar treaties between *France* and *Denmark* have impressed such a distinctive character upon the port of *Bergen* ; I cannot allow that it can be considered, on the mere footing of general neutrality, to be a *French* port, exactly in the same manner in which *London* may be considered as a *Portuguese* port, or *Lisbon* as a *British* port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case ; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt.—For it by no means appears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But 2dly, Supposing that no doubts could be entertained respecting the sufficiency of such sentences ; it

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it by no means follows that the efficacy of the present sentence can be supported: there the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other States may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it: and least of all could such an authority be conceded in the matter of prize of war—a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory; and in which such a concession of authority cannot be made without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession: observe in the present case how it would affect the neutral character of the ports in the north! If *France* can station a judge of the Admiralty at *Bergen*, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that to every purpose of hostile mischief against the commerce of *England*, *Bergen* will differ from *Dunkirk*, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of *Norway* the seats of the *French* tribunals of war, is to make the adjacent sea the theatre of *French* hostility.

It

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It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of *Norway* could no longer be approached by the *British* merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the *American* government defeat a similar attempt made on them, at an earlier period of the war: they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.

Whether the government of *Denmark* has shewn equal vigilance in observing, or equal indignation in repelling the attempt, is more than I am warranted to assert: but though the publicity of the transaction in the town of *Bergen* may subject the police of that place to some degree of observation; I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself: I must, therefore, deem the act of this *French* consul a licentious attempt to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorised.

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I am of opinion upon the whole, that this ship must be restored to the *British* owners upon the usual salvage; and I dismiss the claim of Mr. *Krobn* upon both grounds; as well upon the legality of the sentence, as upon the want of reality in the pretended transfer from the *French* captors: and I must add, that Mr. *Krobn* appearing to possess two characters, that of *Danish* subject and of *French* agent, the claim which he has brought forward favours much more of the latter character than of the former. It is beyond my belief, that any man standing in the genuine and unmixed character of a *Danish* subject, should entertain a wish to establish that sort of law for which this *French* agent has thought proper to contend.

Jan 15th,
1799.

THE HENRICK AND MARIA, BAAR Master.

THIS was a case of a *Danish* vessel taken on a voyage from Norway to Amsterdam, June 28th, 1798.

For the Captor, the King's Advocate contended, that the ship was liable to confiscation for breaking the blockade, as the master, on being warned not to go to any *Dutch* port, declared "he must proceed according to his bills of lading."

For the Claimant, Lawrence argued, that the notice of a blockade of all *Dutch* ports was at that time not true; and therefore it could not be made good

Notification of a blockade is an act of high sovereignty, and not to be extended by those employed to carry it into execution. Notice of a general blockade of the coast of Holland, untrue in fact, is not available by limitation to a blockade of Amsterdam only, though really existing.

good by *limitation or construction* for *Amsterdam*, the only *Dutch* port which was then under blockade.

The
HENRICK AND
MARIA.

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1799.

JUDGMENT.

Sir *W. Scott*—There are two objections taken in this case; 1st, That the notice of the captor was illegal; and 2dly, That the master did not in fact proceed towards *Amsterdam*.

Now, the notice appears to have been “not to proceed to any *Dutch* port:” to be sure that goes a great deal beyond any thing which the captors had a right to prescribe; for they ought to have specified the ports to which the blockade was confined. The great point is, to understand what the master apprehended was the prohibition upon him; for certainly what is represented to have passed between him and the captor cannot be conclusive.

The master says, “he was captured on account of his destination to *Amsterdam*, and because he said ‘he must proceed thither.’” This, it is contended, was merely a hasty declaration of the master, not carried into effect:—and if the master had taken upon himself to say, that upon this warning he did intend to change his course, but was seized immediately; it would be pressing the matter too hardly upon his owners, not to allow him time to express his determination: but he says no such thing; and if his conduct amounts to an obstinate perseverance to go there; I should hold that a blockade may be broken by obstinacy, as well as by fraud; and if a master says, *he will go, and he must go there*, in defiance of notice, his owners must take the consequences of his conduct.

The
HENRICK AND
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It is a circumstance in favour of this man, that the only ships in sight were two *Danish* merchantmen. The sight of one vessel would not certainly be sufficient notice of a blockade: and therefore it is necessary that it should be signified to me, that there was a blockade, *de facto*, before that port.

The evidence is very imperfect on that point: I shall therefore require farther information; and give both parties an opportunity of producing what they think favourable to them.

May 10th.—Farther proof was given of the notice which the master had received of the blockade of the *Vlie* passage.

Sir *W. Scott*—On the former hearing it appeared that some notice had been given; but I wished to obtain more particular information respecting it. The notice was written on the ship's papers, to this effect: “This ship was boarded and warned not to “proceed to any *Dutch* port:” the master states, “that the ship was arrested, because he said he “*must proceed* according to the bill of lading.”

It was open to both parties to have given explanatory affidavits; but the captors have offered none: therefore unless it is shewn that they have been prevented, by absence at sea, or other just cause, I must take the claimants affidavit to be true. The notice is, I think, in point of authority, illegal; at the time when it was given, there was no blockade which extended to all *Dutch* ports. A declaration of blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it.

The

The notice is also, I think, *as illegal* in effect as in authority: it cannot be said that such a notice, though bad for other ports, is good for *Amsterdam*. It takes from the neutral all power of election, as to what other port of *Holland* he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation.

But that he did so, rests only on verbal answers and conversation: I adhere to what I said before, that an obstinate adherence to a first intention would subject a ship to the penalty; and the owners must bear the consequences of the obstinacy of their master: but I think the conversation of this man was not an expression of final intention; but that of a man deliberating under difficulties, in which he was unfairly placed. The captain of the king's ship asked the master, if he knew that *Holland* was blockaded; and he answered, "that he did not." This question agrees with the written notice; and shews how strange a misapprehension the commander had entertained of the nature of the blockade which he was employed to form.

The master said, "he could not answer it to his owners to go to any place but *Holland*." The commander does not point out to him *any ports* of *Holland* to which he might go; but tells him he might go to *Bremen*, *Hamburg*, or *England*; and adds, "as you must go to *Holland*, you are my prize." I think the notice was erroneous, and besides not broken; and therefore I restore this ship.

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Application was made for the claimant's expences, but refused; there being other grounds of justifiable seizure independent of the question of blockade.

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Persons entering a place under blockade *de facto* only, are entitled to warning. By egress a blockade may be broken without notice, as those within are presumed to be *essarily* apprized of the fact.

THE VROUW JUDITH, VOLKERTS Master.

THIS was a case of a vessel taken coming out of *Havre, August 21, 1798.*

For the Captors, the King's Advocate contended, that it fell under the law which had been laid down respecting a breach of blockade; that blockade (a) was broken by egress, as well as by ingress.

*For the Claimant, Laurence argued, that it was necessary to shew there had been a declaration of this blockade; or, if it was only a blockade *de facto*, that it was permanently existing: for the seizure was made by one vessel only; and it did not appear that the others were not at a great distance.*

JUDGMENT.

*Sir W. Scott—This is a ship that was taken sailing under Prussian colours. A claim has been given for a person of *Emden*; but the evidence of property is admitted not to be complete.*

*She appears to have been a prize vessel taken by the French; but after that, her history is no farther detailed, nor does it appear whether she had continued to navigate from French ports or not: all the papers are silent on that point, and there is no bill of sale: at all events, therefore, it is a case which must have gone to *further proof*.*

*(a) Vide supra: The *Fredrick*, *Molke*, p. 86; The *Belfy*, *Murphy*, p. 93.*

The

The cargo is claimed by the master, a young man of four-and-twenty, under the description of his private adventure; but it is far beyond the ordinary value of claims of that sort. It was paid for, according to his account, by bills drawn on the owner of the vessel; and therefore it would be natural to expect some communication between them: but it appears they held no such correspondence; which is, to be sure, a very singular circumstance, not very credible, and one that throws a strong degree of suspicion on his title to the cargo. The vessel was taken on the 21st of *August* coming out of *Havre*: and as a blockade existed at the time, it is argued, that that act subjects her to condemnation.

Taking the fact to be, that there was a blockade, and that the cargo was put on board after the knowledge of the blockade, I should have no hesitation in saying what I have indeed before laid down, that the act of the master of the vessel binds the owner in respect to the conduct of the ship, as much as if it was committed by the owner himself. There are powers with which the law invests him; and if he abuses his trust, it is a matter to be settled between him and the person who constituted him master; but his act of violation is, as to the penal consequences, to be considered as the act of the owners.

Now, with respect to the matter of blockade, I must observe, that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire com-

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merce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this Court means to apply: that a neutral ship departing, can only take away a cargo *bond fide, purchased and delivered*, before the commencement of the blockade: if she afterward takes on board a cargo, it is a fraudulent act, and a violation of the blockade.

It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner, by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice: but it may commence also *de facto*, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore be ignorant of the fact. Vessels going in are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But I take it to be quite otherwise with vessels coming out of the port which is the object of blockade; there no notice is necessary, ~~after~~ the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce: the notoriety of the thing supersedes the necessity of particular notice to each ship.

In respect to this port, there had been a blockade notoriously existing during a great part of the summer: a person breaking it is *prima facie* a delinquent; and the Court will hold it to be incumbent on those who are seized in this act, to prove the circumstances by which they hope to be exonerated from the delinquency imputed to them. Now, it being proved in this, and in other cases, that there was a blockade existing at the time of capture, what is there in this evidence to satisfy me that it was not existing, and notoriously existing, when the cargo was taken on board, and at the time when the vessel came out? The lading was taken in on the 10th of August; and the ship sailed on the 21st.

Was there any reason to believe the blockading force had retired at that time? I find the ordinary force, which is never large, stationed round, at the time of capture: this vessel sallies out, and is immediately arrested: I think, then, there is proof of force sufficient to blockade this port; and evidence to satisfy me that it could not be unknown to the parties: I will farther add, that the case is, in other respects, of a very unfavourable appearance.

There is strong reason to suppose, the cargo and the vessel are neither of them the property of the claimants.

There are many circumstances that prevent the indulgence of farther proof; and looking at the whole of this case together, I think myself warranted to reject these claims.

The claim being rejected, the ship was restored on salvage to the former *British* owner.

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THE COLUMBIA, WEEKS Master.

The penalty of breaking a blockade attaches on the property of persons ignorant of the fact, by the conduct of the master; or of their *confidants* if intrusted with power over the vessel. The actual failing with an intention to break a blockade, is a breach of the blockade.

THIS was a case of an *American* vessel taken on a voyage from *Hamburg* to *Amsterdam*, August 20th, 1798.

JUDGMENT.

Sir *W. Scott*—There is pretty clear proof of neutral property in this case, both of the ship and cargo; but the vessel was taken attempting to break a blockade.

It is unnecessary for me to observe, that there is no rule of the law of nations more established than this; that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed: it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge.

This vessel came from *America*, and, as it appears, with innocent intentions on the part of the *American* owners; for it was not known at that time in *America*, that *Amsterdam* was in a state of investment; and therefore there is no proof immediately affecting the owners. But a person may be penalty affected by the misconduct of his agents, as well as by his own acts; and if he delegates general powers to others, and they misuse their trust, his remedy must be against them.

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The master was by his instructions to go *north about* to *Cruxhaven*. This precaution is perhaps liable to some *unfavourable* interpretation: the counsel for the claimant have endeavoured to interpret it to their advantage; but at the best, it can be but a matter of indifference. When he arrived at *Cruxhaven*, he was to go immediately to *Hamburg*, and to put himself under the direction of Messrs *Boué* and Company. They therefore were to have the entire dominion over this ship and cargo. It appears, however, they corresponded with persons at *Amsterdam*, to whom farther confidential instruction had been given by the owners; and these orders are found in a letter from Messrs. *Vos* and *Graves*, of *New York*, to *Boué* and Company, informing them, that the *Columbia* was intended for *Amsterdam*—consigned to the house of *Crommelin*, to whom *Boué* and Company are directed to send the vessel on “*if the winds should continue unsteady, and keep the English cruisers off the Dutch coast*”: if not, they were to unload the cargo, and forward it by the interior navigation to *Amsterdam*. *Boué* and Company accordingly direct the master “*to proceed to Amsterdam, if the winds should be such as to keep the English at a distance*.” There is also a letter from the master to *Boué* from *Cruxhaven*; in which he says, “*Amsterdam is blockaded*.”

We have this fact then, that when the master sailed from *Amsterdam*, the blockade was perfectly well known both to him and the consignees: but their design was, to seize the opportunity of entering whilst the winds kept the blockading force at a

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distance. Now, under these circumstances, I have no hesitation in saying, that the blockade was broken. The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade: but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud.

But it has been said, that by the *American treaty*, *there must be a previous warning*; certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel appear to have been sufficiently informed of this blockade; and, therefore, they are not in the situation which the treaty supposes.

It is said also, that the vessel had not arrived; that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion, that the sailing with an intention of evading the blockade of the *Texel*, was beginning to execute that intention; and is an *overt act* constituting the offence. From that moment the blockade is fraudulently invaded. I am, therefore, on full conviction, of opinion, that a breach of blockade has been committed in this case; that the act of the master will affect the owner to the extent of the whole of his property

property concerned in the transaction. The ship and cargo belong, in this case, to the same individuals, and therefore they must be both involved in the sentence of condemnation.

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LE FRANCHA.

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1799.

THE King's Advocate moved the Court to pronounce, that head-money was due on the capture of this ship, being an armed and commissioned ship, although she had a cargo on board.

Court.—I conceive that the Court, in no case whatever, directly pronounces head-money to be due; it goes no further than to intimate its opinion, by declaring the number of persons who were on board at the time of the engagement. But the commissioners, who are to pay the head-money, where due, are not, that I know of, bound to pay at all upon the opinion so intimated; though if they do pay, they are bound by the declaration of numbers made by the Court. With respect to the circumstance of having a cargo on board, the Court directed precedents to be looked up. The Registrar said, that on a former search, directed by the judge, such ships appeared to have been deemed not entitled.

The Court of Admiralty will not pronounce whether head-money is due or not; but only the number of men on board. It does not pronounce that, when there is a cargo on board.

October 22d, 1799.—This subject being moved again in the case of *The Ceres*, the King's Advocate prayed, that the King's Proctor might be directed to make a search also, as it was a question in which king's ships were much interested.

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The Registrar said, that he and the *King's Prosector* had searched together; and that they had found the precedents were all one way, against pronouncing for head-money when a cargo was on board.

Court—If my opinion had not been affected by these precedents, I cannot say that I should have taken such a distinction; but as there are such precedents, the Court will be guided by them.

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THE ARGO, SMIT Master.

Letters of prosecution are required to be exhibited in purchases made by agents in the belligerent country.

A discussion of proofs of property. Fraudulent appearances.

Condemnation.

THIS was a case of a ship and cargo taken on a voyage from *Nantz* to *New York*, and claimed as the property of Mr. *Abegg* and Company, of *Emden*.

JUDGMENT.

Sir *W. Scott*—This is a prize ship, asserted to have been purchased in *France* for Mr. *Abegg* and Company, whose transactions have appeared before this Court in other cases, not much to their advantage; and although it is not on considerations of this kind that I must determine the present case, I cannot entirely overlook the conduct of parties, as far as it has judicially pressed itself on my notice.

The bill of sale purports the vessel to have been an *English* prize, regularly condemned and bought by agents in *France*, on behalf of Mr. *Abegg* and Company; but there is a difficulty in this, and it is not fully explained.

magistrate, and declare before him the commission under which he acts. It must be shewn to me by proper documents, that the asserted agent was legally authorized to make this purchase.

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On this statement of the case then it is a case of *further proof*; as there is no *procuration*. And being so, it becomes necessary to look farther into it: for unless the circumstances are such as to satisfy the Court, at least in some degree, that it is a fair case, the parties will not be entitled to the privilege of *further proof*.

The circumstances of a case may be such as to make it utterly incredible, although there are confident attestations in support of it; the circumstances may be highly unnatural and irreconcileable with any view of a fair transaction. The Court must undoubtedly be upon its guard against running wild upon mere general presumptions; but it must judge of the common transactions of life upon the same ordinary principles on which the probity and fairness of such matters is examined in the general practice of mankind.

The account given of this transaction is, that this
ship being laid up unemployed, Mr. Abegg sent for
this master, though personally unknown to him; a
man by birth a *Prussian*; but who, being a single
man, and without a residence, had ~~national~~
~~character~~ ~~hat of the service~~ ~~was~~
~~employed~~ ~~feels out such~~ ~~to~~
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action; and, to be sure, it could not begin in a more unnatural manner.

But the sequel is of a piece with it; for that a merchant should confide in a perfect stranger, and trust him with a valuable cargo, in a trade perfectly new to him; that he should send for him to *Emden*; yet, during his stay there, hold no conversation with him respecting the future management of his vessel; that he should send him away without mentioning to him the name of any consignees, without any documents except a printed pass, and without any instructions, except to go to *Peyruffet* at *Nantz*, who had been the former proprietor of this vessel; that *Peyruffet* should be the only person to supply him with money and directions: all these are circumstances of gross improbability; and when I look at the evidence by which they are to be supported, instead of being clear and satisfactory, it is irreconcileable to any supposition of a fair case.

The whole is loaded with difficulties, which leave on my mind a conviction that the name of *Abegg* has been used in this case for purposes to which a neutral name ought not to be accommodated.

There are besides many other circumstances equally suspicious: when the ship is brought in, the master writes to Mr. *Fridag*, his asserted owner's correspondent in *London*, informing him, that the *ship is taken*; and she is immediately claimed. But no claim is given for the cargo till after a considerable time. It is said no mention was made of the cargo, as it is not usual to mention it, although it belongs to the owner of the ship. It may be so: but it seems to be the natural conduct on such an occasion, and

and indeed the duty of the master, when both are equally in danger, to take care of one as well as of the other.

The master says, to the fourth interrogatory: "That *Peyrusset* delivered possession of the vessel to him;" To the seventh, "That the voyage was to end at *New York*." Although I am satisfied on many grounds, that he was to have returned again to *France*.

To the ninth, "He believes *Abegg* and Company to be the owners, because *Abegg* and *Peyrusset* told him so." But he does not say, that *Abegg* ever exercised one act of ownership, except that of sending him to take possession.

To the thirteenth, he says, "He believes the cargo to be the property of *Abegg*, because he told him so." But yet he gave him no orders respecting it, whilst he was at *Emden*; nor was it at that time on board, or purchased.

It is, besides, observable on the cargo, that it consists of *British* articles; and the only account given of that circumstance is, that being prize goods, not allowed to be consumed in *France*, neutrals had therefore an opportunity of purchasing them cheap: to the fifteenth, he says, "There was a charter-party signed between him and *Peyrusset* on one side, and three *French* brokers on the other." It is certainly not uncommon to see charter-parties, where the ship and cargo appear to belong to the same person; and for the purpose of ascertaining the separate accounts: but why three *French* brokers should intervene, cannot be so easily explained. It was, besides, not a little extraordinary, that these *French* brokers should stipulate

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Aico.

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with him to employ Mr. *Schweigbause*n, as his consignee; and that the master should agree to accept him, although he had never before heard of his name; more especially, as he was not in the list of Mr. *Abegg*'s correspondents, and the master had received no instructions to that purpose from his owner.

It is observable also, that the cargo was going under three different marks; and the letter to the consignees directed them to ship the returned cargo under the same marks. This is much more consistent with the supposition of three several interests, for which the *French* brokers acted, than with this claim for it as the entire property of one man. Besides, as it has been observed, these distinctions could not be meant to serve as directions for the insurance, for that appears to have been done for one person only, as the *sole* proprietor.

To the twenty-fifth interrogatory the master says, "That he wrote to *Abegg* from *Nantes*, and received three letters from him, which he burnt before his departure." That this amounts to the same offence as a spoliation of papers after the commencement of the voyage; I will not say: but it is an extraordinary circumstance, that having not one scrap of paper from his owner, he should think these of no consequence: it is a conduct so unusual, that it leads strongly to a conviction, that the contents were such as would not bear the eye of an observer. Upon the whole, these are all circumstances so utterly inconsistent with any view of a fair case, that I am convinced the ship and cargo cannot be the property of this neutral claimant. Every part of the evidence points strongly to *French* interests. I shall, therefore,

fore, condemn the ship and cargo, and direct the ship to be restored, on salvage, to the former *British* owner.

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A. A. A.

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THE VROUW, HERMINA JONKER Master.

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1799.

THIS was a case of a ship, formerly a *Dutch* vessel, but asserted to have been transferred to a neutral merchant.

JUDGMENT.

Sir *W. Scott*—This is a claim given for a ship as the property of a person of *Weender*, in *East Friesland*. It is admitted on the part of the claimant to be a case loaded with considerable difficulties; and the prayer is only, that an opportunity may be given for explaining them by farther proof.

The question for me, therefore, to consider is, Whether these difficulties are of such a nature, as to admit of a fair and satisfactory explanation? because, if they are not; if they are out of the reach of any rational solution, farther proof would be no benefit to the party praying it: it would be attended with much delay and expence to the captors; and I should therefore think it my duty to refuse it.

The ship was taken on the 17th of *August*, 1798. A claim was given for the cargo on the 4th of *October*; but no claim whatever was given for the ship till the 8th of *December*; not till four months after the capture. This delay is more extraordinary; because we

Further proof is not granted in cases appearing incapable of fair explanation.
A petition for a rehearing on account of the mistake of the agent was refused, the suggestion being insufficient.

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find the master is himself a part owner of one third share. This is an extraordinary circumstance, and not like the natural conduct of a person holding a real interest. The vessel was brought into *Portsmouth*; but it is not till the 8th of *December*, that any claim is given; and it is then given by Mr. *Fridag*, the *Prussian* consul, for Mr. *Bracktezende*, as the *sole* proprietor. *That* again is an extraordinary circumstance; because there is no pretence to say, that this inaccuracy could have proceeded from hurry or want of time. It is not till after four months that a claim is given; and then not, as it ought undoubtedly to have been, representing all the joint interests; but stating Mr. *Bracktezende* to be the *sole* owner.

The vessel is *Dutch* built, manned by a *Dutch* crew, and commanded by a person who was by birth a *Dutchman*, and has almost always resided in *Holland*; although there is one paper on board, a certificate, which holds out the master to have been born at *Weender*. On his examination, however, he says he was born in *Holland*; and lived there till within the last eight years. The transaction is entirely *Dutch*: the course of employment of this vessel is constantly returning to *Dutch* ports. She never goes to *Weender* or *Emden*; but is as much a stranger to all *Prussian* ports as if she had no connection whatever with that country.

The papers purport a destination to *Lisbon*: but it is admitted now that she was going *really* to *Guernsey*: and this misrepresentation is said to have been necessary, in order to obtain a clearance under the practice, common to all countries, of refusing to permit neutral vessels to clear out for an enemy's port.

port. This has certainly appeared to be true in many cases: but that is not all in this case; for the master persisted in the same account when he was stopped: he withheld the papers which shew his real destination; and it was not till some person came to him from the consignee, that he confessed the real fact: here then was a voluntary deviation from truth: and his conduct, in suppressing the true fact till it was extorted from him, goes much beyond the temporary caution which it may be sometimes necessary to practise, to conceal the real destination, on clearing out from a belligerent country.

It is, besides, a strain of falsehood that runs through the whole case; for there is not one paper relating to the ship which does not contain some misrepresentation: now the Court has laid it down, that where gross misconduct is proved against the persons claiming an interest in the property, *further proof* shall not be allowed. The cases in which the Court has hitherto applied this rule, have been cases of purchase in an enemy's ports during the war: and it is attempted to clear this case from that imputation, by shewing that the sale of this vessel took place eight years ago; and that the master did at that time migrate from *Holland*, and settle himself as a resident person at *Weender*.

If these facts were made out to my satisfaction, perhaps I should not be disposed to press the false destination as a conclusive circumstance. But what is the proof upon which I am to receive these facts? If this assertion was true, it is reasonable to suppose there would have been some documents. The master would have known the importance of proving the

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date of his purchase, by a bill of sale, or by a pass; but the pass is the only paper which connects him with the property of this vessel, and *that* is dated October 1797. If it had been a pass of the last year, it might have been said, there were others before: but it is a pass of the year 1797, and there is not a word importing it to have been a renewed pass. It is, besides, false on the face of it; for it describes the master as the sole owner, and purports to have been granted to him "*sibi soli*, on his appearance and " personal oath;" whilst the truth is, according to the master's own deposition, "that he was not at *Emb. den*; but the pass was sent to him at *Rotterdam*, by Mr. *Brackezende*, who obtained it on *bis* oath." The pass, then, is falsified in this important point; and therefore forfeits all claim to credit in other particulars. It becomes an instrument to which the Court can pay no attention.

It is, besides, a circumstance which very much confirms the suspicion of a later purchase of this vessel; that although the master speaks of former voyages, in general terms, when he enters on a detailed account, there is not a word said, relating to her history, before the year 1797. The pass is of that date; and the history of the vessel begins only from that time. This is a singular coincidence; and strongly convinces me that the transfer is not to be carried farther back.

With respect to the master's change of residence, what is there to satisfy me that it took place so long as eight years ago? The only paper on that point, is, No. 4. a certificate, stating "that captain
" H. Jack-

“ *H. Jackson* the younger, is a resident burgher of, “ this place :” it is dated *July 1795*, and signed by *Mr. Brackezende* the other claimant, as *deputy of the county*. It is singular that it should not state more particularly *when*, and from *what place*, he removed thither : and that when the great point to be established was, the time of his residence there, it should be entirely silent on that subject. The master’s own account states, “ that he removed from *Vendam* to “ *Weender* eight years ago ;” that he still owns a “ house in *Vendam*, which he lets ; and has been “ there occasionally since ; sometimes occupying “ apartments in his own house, and sometimes on “ visits to his friends.” It is observable, however, that he never sailed from *Weender*, or from any other *Prussian* port : and it is, I think, a little extraordinary, that meaning to continue in the *Dutch* commerce, he should subject himself to the inconvenience of removing to a foreign port, from which he does not pretend ever to have navigated.

Upon the whole of this evidence, then, I do think there is no dependence to be placed on the master’s account : if I look to the papers, there is not one that is not liable to great objections.

The pass is defective, as to time ; and false, in representing the master to have been born at *Weender*. The *Emden* pass is contradicted, as to the master’s personal appearance, and his sole interest. Under these circumstances, I think no explanation which could be given, would satisfy me ; and combining this with other considerations, that it is a *Dutch* ship, manned by a *Dutch* crew, and occupied in *Dutch*

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The
Vessel.

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commerce, I think myself warranted to condemn this vessel as *Dutch* property.

Cargo reserved.

February 7th.—Mr. *Fridag* finding that he had made a mistake in claiming the vessel as the sole property of *Bracktezende*, when his instructions represented it as belonging two-thirds to *Bracktezende*, and the other third to the master, petitioned the Court to rehear this case.

For the captors, it was contended, that it was not in the power of the Court to grant this request; that the sentence having been pronounced and registered, could not now be revoked but by consent.

Conrt.—This is an application to the Court, on behalf of Mr. *Fridag*, to rescind the conclusion of a cause, and rehear it, on another statement of the claims; and the suggestion is, that Mr. *Fridag*, as agent, had made a mistake in claiming for one proprietor only, when the papers and his instructions represented the ship to be the joint property of Mr. *Bracktezende* and the master.

I will not go so far as to lay it down universally, that it is not in the power of the Court to reconsider its decrees on very particular occasions; because I do not think it is necessary to discuss that point at present: I consider the application to proceed from the feelings of an honorable mind, anxious to acknowledge and rectify its mistakes; and in that point of view it is highly creditable to Mr. *Fridag*; but I think it can have no legal effect. As a precedent it would be a practice highly dangerous: and the liberty of reviewing

viewing its decrees, if it exists, which I do not affirm, is a liberty which the Court would exercise with very great caution; because, I foresee, that were applications of this sort to be easily admitted, they would be very frequently made on reasons much less sincere than those which are now offered to the Court.

In this petition a reason is assigned for the lateness of the claim: "that Mr. *Fridag* had some scruples "about the credit of his employer, as he had been "obliged to have recourse to law to enforce a just "demand against him." With this I have nothing to do: but with respect to the lateness of the claim, I will say, *that was only spinis e pluribus una*—it was but one circumstance out of many with which the case was oppressed.

Another circumstance which Mr. *Fridag* wishes to explain is, his mis statement of the claim: he claimed the ship for Mr. *Bracktezende* only, instead of claiming it as the joint property of Mr. *Bracktezende* and the master, "as he should have done, if he had had "recourse to his papers."

I protest I think the case had as good a chance on a claim given at random, as if it had been made on these papers; for it must be extremely difficult to construct any claim upon them: no two agree. In one, the ship is represented as the property of the master; and that document purports to have been granted on the master's oath: but the master denies that he ever made such an oath. In his depositions *he* describes Mr. *Bracktezende* to be the *sole proprietor*: and now Mr. *Bracktezende* states himself to be owner of two-thirds only; so that I cannot think

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think but that the accident which has given Mr. Friday so much concern, might have been fully as beneficial to the claimant as if the papers had been scrutinized with the greatest accuracy; there must have been great discordance under any arrangement: the cause has not, in my opinion, sustained any injury. Without discussing the power of reviewing a sentence, I think the reasons given do not sufficiently sustain the application, and therefore I reject it.

Jan. 28th,
1799.

THE NEPTUNUS, KUYP Master.

THIS was a case of a ship taken coming out of the Texel, September 7th, 1798.

JUDGMENT.

Sir W. Scott—This case comes on now, upon the ship only.

In the affidavit annexed to the claim, it is said, there is an authority given to claim the cargo; and that there are some facts which may take that part of the case out of the law which has been laid down respecting a breach of blockade; I shall therefore reserve that till a future day; saying at present only, that I shall expect the claim to be very special, and the proof to be very satisfactory as to the time when the transaction took place.

There are two questions respecting the ship: a question of property, and a question arising on a breach of blockade. Now, as the Court has frequently decided, that neutral vessels breaking a blockade

are

A blockade *de facto* expires
de facto: but a
blockade by no-
tification is
prima facie pre-
sumed to con-
tinue till the
notification is
revoked: this
presumption
throws the *onus*
probandi on the
claimant.

are liable to confiscation ; if I am satisfied, that the ship has been guilty of that offence, it may be unnecessary to enter into the former question ; or to inquire whether the property belongs to the claimant, or to those *Dutch* merchants, Messrs. *De Sylva*, who have, in a letter found on board, certainly expressed themselves very much with the anxiety and the authority of owners.

The capture was made on the 7th of *September* off the *Vlie* passage, by two *English* armed ships, about seven miles from the *Dutch* coast. The Court has before laid down the rule, that a blockade is broken as much by *coming out* with a cargo as by going in ; and the only exception which the Court has noticed in laying down this rule, is *that* of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade.

There are two sorts of blockade ; one by the *simple fact* only, the other by a notification accompanied with the fact. In the former case, when the fact ceases, (otherwise than by accident or the shifting of the wind,) there is immediately an end of the blockade : but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments ; I apprehend, *prima facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty undoubtedly of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it : to suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral nations ; and a conduct which we are not to suppose any country would

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Vid. *supra*,
The *Frederick*,
Molke, p. 36.

The
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would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto*: but I say, such a conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, I shall hold, that a blockade by notification is, *prima facie*, to be presumed to continue till the notification is revoked.

The notification of the blockade of this port was made on the 11th of June 1798: the ship was in the *Texel* at the time; the owner was at *Emden*; and the blockade must have been perfectly well known there by the latter end of the month; her duty was to have retired: but it is said, the cargo was *Portuguese* property—and purchased before the notification. Perhaps it might be so: but there could be no obligation on this *Prussian* vessel, to take it away. Instead of pursuing the prudent conduct of withdrawing just after the blockade began, in the months of *July* and *August*, this ship is employed in taking a cargo on board.

That it should be done with an intention of continuing there till the blockade ceased, is not probable. The presumption is, that it must have been done with a fraudulent design of slipping out, if any accident should afford an opportunity of escaping. In the month of *September* she sails; and is immediately stopped by these two armed vessels.—But it is said, there was no blockade *de facto*; and that this small number of vessels only, is a proof that there was no efficient actual blockade. I am quite of a contrary opinion; for surely it is not necessary that the whole blockading force should lie in the same tier; nor is it material that a vessel had escaped the rest.

rest. These ships were in the exterior line, as I understand it; and if there had been only these, I should have held them to be quite sufficient. It is unnecessary for me to consider, however, whether the blockade was continued by these ships or not, as the presumption being raised by the notification, it rests on the other side to prove the contrary.

Thd
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THE EXETER, WHITFORD Master.

Feb. 1st,
1799.

(In the Instance, or Civil Court of Admiralty.)

THIS was a case of a ship hypothecated at the *Cape of Good Hope*, in several bottomry bonds, bearing date the 25th of *November 1797*.

The holder of one of them having instituted proceedings, and obtained a *primum decretum*, or a decree of the Court, for putting him into possession of the ship, *June 22d, 1798*; application was now made to the Court, that he might be allowed interest from the date of the decree.

For the Petition, *Swabey* argued—It would be very hard if this party should recover less on his bond than the other bond-holders; and merely because he had used greater diligence. Had he delayed to proceed till *November*, there could have been no question respecting the intermediate interest: it is therefore but a just demand that he should receive it now, notwithstanding the decree; as it is nothing more than what might have been effected if the other parties had not withheld their consent; especially since

On a *primum decretum* interest prayed, from the date of the decree to the obtaining of the proceeds of the vessel, was refused.

The
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since it is a consent which the Registrar seems to have required unnecessarily: when bail is tendered, the other parties may have a right undoubtedly to notice, and may dissent if the security is bad; but it does not appear that their consent is necessary. The decree of sale, and possession of the proceeds, are but matters of form, and ordinary process, after the issuing of the *primum decretum*. The suspension of the sitting of the Court during the last summer had prevented the party from applying to the Court; and therefore he ought, in equity, to receive compensation for the delay, and be allowed interest equally with the other parties.

On the other side, the *King's Advocate*—It does not appear what injury can be imputed to the other parties for withholding their consent, if, as it is contended, their consent was not necessary. The Registrar thought it was necessary; and the act of the parties has been perfectly neutral: they did not take upon themselves either to consent, or to oppose the measure. On general principles, and in the practice of all Courts, interest is not allowed to accrue after judgment. *Vesey, jun.* vol. ii. page uk. If there has been any inconvenience arising from the regular manner of proceeding, or from accidental circumstances, it is that *damnum sine injuria*, for which the parties can have no redress.

Court—Let me ascertain the correct practice of the Court: this *primum decretum*, I perceive, gives not only possession of the ship, but of the proceeds also. Is not that going a step too far?

Swabey—I fear that is irregular.

JUDG-

JUDGMENT.

Sir *W. Scott*—This is an unfortunate insolvent case in which the Court would feel no inclination to give to any one claimant more than he could legally demand.

It appears that a *primum decretum* was obtained so long ago as last June: but in obtaining it, the party seems to have gone farther than the forms of the Court would allow. The effect of that decree should be only, in the first instance, to put the party into the possession of the thing. All farther proceedings of sale, and power over the proceeds, should be by subsequent application to the Court. In this case, the ship was sold without application to the Court. When the Court signed the decree, it could not have been aware that the tenor of the decree was not in the usual form; and that it went farther than such a decree should go, in concluding with a power *over the ship and proceeds*.

I think much of the inconvenience of the party has arisen from this irregularity. When application was made to the Registrar in August to deliver out the proceeds; he refused, rightly in my opinion, to pay on that instrument, without the consent of all parties.

Interest after judgment is not usually allowed: but if the other party occasioned unnecessary delay, I see no reason why, in equity, interest after judgment might not run. If that had been the case, I should have found no difficulty: as it is, the opposition was perfectly justifiable. It is said, that an earlier application to the Court could not be made during the latter part of last summer. That was an unfortunate circumstance; but unavoidable. Upon the whole,

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whole, I am of opinion, that it is impossible to decree interest in this case.

May 4.—On this ship another application was made to the Court, respecting the priority of one of several respondentia bonds given at a former period of the voyage, at *Bombay*, in *December 1796*. The facts were: the vessel being on a voyage from *Bengal* to *London* was obliged to put back to *Bombay* to repair: the master, being in want of money, advertised in the *Bombay Courier* of the 12th of *November 1796*, for the loan of certain sums of money; not less than 5000, nor more than 40,000 rupees; to run at respondentia, on the security of the ship and her freight. Three tenders were made; one on the part of *G. Hall* for 8000 rupees, on the 16th of *November*: one on the part of *Forbes* and *Smith* for 5000, at the same time: and one on the part of *Major Thompson* for 8000 rupees, on the 14th of *December*.

The tenders were accepted, and the money advanced at the same time. The bonds of *Hall* and of *Thompson* bore date the 14th of *December*: but the bond of *Forbes* and *Smith* bore date the 8th of *December 1796*. The proceeds of the ship proving insufficient to pay all demands, an application was made on the part of *Mr. Forbes*, that he might have a preference in respect to the priority of the date of his bond. The evidence arose from the affidavit of Captain *Whitford*, who produced the original advertisement in the *Bombay Courier* for the tenders; and made oath; “That, as he best recollects, he received the respective sums therein mentioned, at

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“ the same time, and the same were all expended
“ on the same aforesaid refitment.

“ That he believes the said tenders were respect-
“ ively made, and the said several sums advanced
“ by each of the parties, with the knowledge and pri-
“ vity of each other: that he believes no preference,
“ in regard to the repayment thereof, was expected
“ by either of the said parties: and that he never
“ meant or intended to give any preference what-
“ ever to either of them therein.

“ That he has since understood that the aforesaid
“ respondentia bond, by him so given to Mr. *Forbes*
“ and Company, was dated a few days prior to the
“ other respondentia bonds given to G. *Hall* and
“ Major *Thompson*; but he can by no means account
“ for the same, as all the said *bonds ought* to have
“ borne date on one and the same day; inasmuch as
“ he verily believes they were executed at the same
“ time.”

The Court, after the reading of this evidence asked,
whether these facts were denied; it being answered,
they were not.

Court—As it appears the parties acted in privity
and concert with each other; as the money was ad-
vanced on the same general invitation, for the same
repairs, in which all were equally interested, and on
the same terms; the payment must be *pro rata* with-
out any preference.

Feb. 1st,
1799.

On salvage the master and crew are strictly the only salvors. The owners claim only under the equitable consideration of the Court for the risk of their vessel, &c. The Court is not disposed to allow their claim to any great amount.

THE SAN BERNARDO, LARETTA Master.

THIS was a case of a *Spanish* ship retaken from *French* captors in distress, by an *English* non-commissioned vessel.

The property becoming a droit of Admiralty, it was referred to the Court to fix the proportion of reward due to the salvors. The value of the property saved was estimated at 12,000*l.*

The King's Advocate proposed a sixth. The Court thought that was too little; and decreed a third. Arnold then prayed the Court to distribute that sum, and to allot a considerable portion of it to the owners of the *British* vessel, in consideration of the risk of their ship and cargo; and also of the danger of forfeiting the policies of insurance by deviation. It being asked by the Court what was the ordinary proportion of sharing between the owners of privateers and their crews; it was said, that the most general division is three-fourths to the owners and one-fourth to the crew; although it is sometimes in moieties, according to particular agreement.

Court—This is a case of no very great exertion: the principal merit consisted in taking possession, and in guarding so many people. The master and crew are in strict language the only salvors. The owners have in general no great claim; as to labour and danger none. They come in only under the equitable consideration of the Court for damage or risk, which their property might have incurred. In general I shall not be disposed to admit the claim of owners.

to any large amount. I may consider their possible risk, but I shall not extend that too far. In the present case, as the parties seem to have agreed upon the matter, I shall do what I shall not be disposed to do in other cases. I shall give 2000*l.* to the owners; to the master 1000*l.* and the remainder to the crew, giving the mate a double share with them.

The
SAK
BERNARDO
Feb. 6th,
1799.

THE MENTOR, CAMBELL Master.

THIS was a case of an American ship, destroyed by his Majesty's ships the *Centurion* and *Vulture*, (part of Admiral *Digby*'s squadron,) cruising off the *Delaware*, in the year 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties.

JUDGMENT.

Sir *W. Scott*—In this case, which comes before me for judgment, the loss which the claimant has sustained is extremely to be lamented: but it has been well observed by the counsel, that it must be on legal grounds only that I can give him redress; and if there are legal grounds that impose upon the Court an incapacity of affording redress, I may lament it, but I cannot give relief, upon mere grounds of humanity; humanity is only the second virtue of Courts; justice is unquestionably the first: and justice would be grossly violated by providing a relief for one innocent man at the expence of another, who is not legally subject thereto.

Feb. 6th
1799.

The actual wrong doer is the only person responsible in the Court of Admiralty for injuries of seizure: a suit dismissed against the Admiral of the station being not privy to the fact.

The
MAYOR.
J.A. 5th,
1799.

The case, I have said, is an unfortunate one. It is likewise a case extremely peculiar in its circumstances ; and the first peculiarity I shall notice, is the commencement of such a suit at the distance of near seventeen years from the transaction.

It is not within my recollection, that a case of such antiquity has ever been suffered to originate in the court ; I do not say that the statute of limitations extends to prize causes ; it certainly does not : but every man must see that the equity of the principle of that statute in some degree reaches the proceedings of this Court ; and that it is extremely fit that there should be some rule of limitation provided by the discretion of the Court, attending only to the nature and form of the process conducted here ; by which captors or other persons should be protected against antiquated complaints. And if there is any case of remote antiquity, which ought not to be entertained ; undoubtedly *that* would be one in which it clearly appeared that the party complaining had been fully apprized of the nature of his injury, and of the mode of redress which he ought to have pursued.

That brings me to the second peculiarity in this case, which is, that there was a suit in this very Court, upon this very subject, ten years ago ; not indeed *against* the same party, but instituted *by* the same party who now complains, and who was as perfectly in possession of all the facts of his case at that time, as he is at this present moment.

The third peculiarity, I must notice, is an entire novelty in a prize cause, *viz.* that it is a proceeding for calling to adjudication, not the immediate alleged wrong-doer, but a person who was neither present at

nor

nor cognisant of the transaction; and who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority;—for as to particular orders applying to this transaction, it is not pretended that any were given or could be given: he was only the Admiral on the general station, and the ships which committed the alleged outrage were under his general command, but at a great distance from him.

The
MENTOR.
Feb. 5th,
1799.

Now, really it appears to me, that it is the very first time that the attempt has been made in a prize cause, to pass over the person, from whom the alleged injury has been received, and to fix it on another person, on the ground of a remote and consequential responsibility: and I call upon the experience of persons attending in this Court, to state, whether there is an instance of that kind to be found in the annals of the Court.

The actual wrong-doer is the man to answer in judgment; to him responsibility is attached in this Court. He may have other persons responsible over to him; and that responsibility may be enforced. As for instance; if a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act: but it is the constant practice of this Court to have the actual wrong-doer, the party before the Court, and every man must see the propriety of that practice; because if the Court was once to open the door to complaints founded on a remote and consequential responsibility, where is it

THE
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to stop? If a monition is to go against *the Admiral*, for not issuing his revocatory orders; a monition, might in like manner, go against the Lords of the Admiralty, for a similar neglect: or against the Secretary of State for not issuing similar directions to the Lords of the Admiralty; and these persons might be made parties in a prize cause; and called upon to proceed to adjudication.

If the legal responsibility is to be shifted from the actual captor, to whom is the claimant to look? where is he to find the responsibility, in the chain of persons who may be somehow or other involved in the different stages of the transaction? Where is he to find his wrong-doer, if you once take off that character, from the person who immediately commits the injury? Where is he to resort, if you take from him that easy and direct resort, with which in the present understanding of the law he is provided? I am most clearly, on this ground, of opinion, that Admiral *Digby* alone cannot be compelled to proceed to adjudication under this monition.

The circumstances of the case, as far as it is necessary to state them, are these:—The ship being *American* property, was on a voyage from the *Havannah* to *Philadelphia*; off the *Delaware* she was pursued by his Majesty's ships *The Centurion* and *The Vulture*, then cruising off that river, under the command of the admiral on that station, Admiral *Digby*. All parties were in complete ignorance of the cessation of hostilities; not only the persons on board the King's ships, but the *Americans*, as well those on the shore, as those on board the vessel. In the pursuit, shots were fired on both sides, and

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It is alleged on the part of the *British*, that the ship was set on fire by her own crew, who took to the shore.

Now, I incline to assent to Dr. *Laurence*'s position, that if an act of mischief was done by the King's officers, though through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of *that fact* would protect the officers from civil responsibility. If by articles, a place or district was put under the King's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize; to shew that he had been injured by this breach of the peace, and was entitled to compensation; and if the officer acted *through ignorance*, his own government must protect him: for it is the duty of government, if they put a certain district within the King's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons; they are to be borne harmless, at the expence of that government whose duty it was to have given that notice.

I am therefore inclined to think, that the determination of the Judge in the former case did not turn upon the mere circumstance of ignorance on the part of the King's ships; but that, looking at all the circumstances under which the event took place, and considering their just and legal effect, he was of opinion upon the whole result, that the *proseß* on the part

The
MENTOR.

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1799.

part of the captors was well sustained: if that opinion of the Judge was erroneous an appeal ought to have been prosecuted: no appeal was prosecuted; though such a purpose was formally declared, and a *protocol entered*; but no further proceedings were pursued thereon.

Mr. *Wilson* states in his affidavit, "that distress of fortune prevented him from proceeding further;" I have to lament that, as well as many other circumstances that accompany the case, but courts of justice must pursue the legal modes; they cannot bend to the private distresses of individuals. If an appeal is not prosecuted, the conclusion of law is, that the party acquiesces in the decision.

Now, what did the Judge determine? He determined *this*; that the act of destruction which took place, took place under such circumstances that the captor was not compellable to proceed to adjudication upon it: and shall I at the distance of ten years, after he has determined *that the actual captors* were subject to no responsibility at all, determine that Admiral *Digby*, a person totally ignorant of the whole transaction, at the distance of thirty leagues from the place where it passed, and utterly unprovided with all the means of defence, which either a knowledge of the fact, or the possession of evidence can supply, is liable after a lapse of seventeen years, to be called upon to proceed to adjudication; or in other words, to justify the destruction of this vessel, or failing therein, to be answerable in damages? Surely such a determination could be founded on nothing but a determined opposition to every principle of

law

law and justice by which the proceedings of this Court have been directed, ever since it bore the shape of an established Court of Justice.

Having said this, I shall decline entering minutely into the circumstances of the case, which have been rather alluded to than particularly discussed by the counsel: I feel for the misfortunes of the claimant; he has applied to this Court, and he was judicially informed ten years ago, that the loss he has sustained was not of that nature which would entitle him to support an action for damages against the persons whom he considered as the immediate wrong-doers; still less can he be entitled to support it against the person who is the object of the present suit: and I therefore, with the fullest conviction of mind, discharge Admiral *Digby* from the effect of the present monition.

The
MENTOR.

Feb. 22d,
1799.



O R D E R O F C O U R T,

J U L Y 3d, 1799 (a).

THAT in all motions for commissions and decrees of appraisement and sale, the time shall be specified within which it is prayed that the commissions or decrees shall be made returnable.

THAT the Commissioners and Marshal make regular returns on the days on which their commissions or decrees are returnable, stating the progress that has been made in the execution of the commissions or decrees; and, if necessary, praying an enlargement of the time for completion of their business.

THAT the Commissioners and Marshal bring in the proceeds which have been collected at the same time with their returns; and that if the whole proceeds have not been collected, they retain only such sums as may be required to answer accruing expences.

THAT on the return of commissions or decrees the Commissioners or the Marshal bring in all vouchers.

(a) The Editor has brought forward this Order without regard to its date; that, as a matter of public regulation, it might be inserted as early as possible.

THAT

THAT no cause shall be put upon the list for hearing, where any commission or decree of appraisement and sale is outstanding, and the proceeds not brought into the registry, without special application to the Court to dispense with this Order according to the circumstance of the case.

E R R A T A.

Page 14. line 14. *for Zacharia read Zacharie,*
 — 4. *in marg. for Hazan and Earnest read*
Haasum and Ernst
 28. — 4. *after although add a mixture of, and*
for effect read affect
 52. — *antepenult, for 1692 read 1672.*
 57. — 12. *for Court read Courts*
 141. — 15. *for treat read meet*



R E P O R T S

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY, &c. &c. &c.

THE JONGE MARGARETHA, KLAUSEN
Master.

Feb. 5th,
1799.

THIS was a case of a *Papenberg* ship, taken on a voyage from *Amsterdam* to *Brest* with a cargo of cheese.

For the Captors, the King's Advocate contended that the ship and cargo, belonging to the same person, were clearly confiscable, as concerned in a contraband trade of provisions to a port of naval equipment, and relied on the case of the *Vriendschap, Jansen*; in which the ship carrying salted beef from a *French* port to *Brest*, was condemned, although not belonging to the owner of the cargo.

For the Claimant, Arnold and Swabey—It is contended, that this ship and cargo, being the property

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of

Provisions are not contraband but under particular circumstances. Their contraband nature how determinable. Cheeses sent by a *Papenberg* merchant from *Amsterdam* to *Brest*, condemned.

Adm. July 5,
1798.

The
JONGE MAR-
GAZETTE.

Feb. 5th,
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of the same person, are both confiscable, as concerned in a contraband trade. But provisions are not generally deemed contraband. *Grotius* speaks of them as articles *promiscui usus*, and specifies some circumstances under which they may become contraband; but those circumstances are of a very particular nature, such as the relief of places in distress; and the general character is left free from exception, unless under such particular situations and circumstances.

Under the *French* law, which is a law of great severity, they have never been considered as contraband; nor under the law of *England*, except in conjunction with other particular facts. The case on which the captors rely was composed of such facts—the papers were false—the voyage was from one *French* port to another; and the cargo consisted of articles in a more prepared state—of a quantity of salted beef. The cargo was besides never claimed, and the ship was considered in the adopted character of a *French* victualler, and condemned as such. If the case is to be decided on precedents, the claimants are entitled to argue, that no precedents in point have been cited against them; but that there are, on the other side, a variety of old cases in which cheese has been restored as not contraband: In 1747, the *Endragbt*, a *Prussian* ship, from *Amsterdam* to *Bourdeaux*; 3d of March 1747, the *Juffrow Magdalena*, a *Prussian* ship, from *Amsterdam* to *Bourdeaux*. In this last case there were many articles given up as contraband, but beer and cheese were restored with this dictum, “that they were articles of luxury, and not merely ship’s provisions.”

In the present case the cheese is in no state different from what would be useful for consumption on land, as well

well as at sea. There have been no instances in which this article has been condemned, either in the present or in the last war; and therefore it is submitted these claimants are entitled to restitution.

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Court—I have many cases in which cheese has been restored; but are there any that apply to the circumstance of a destination to ports of naval equipment? I shall defer this case, that more precedents may be examined; and in the mean time I direct an inquiry to be made as to the particular nature and quality of these cheeses, by some officer of the king's stores.

On the 20th of *March* the store-keeper's certificate was produced, stating them "to be such cheeses as are used in *English* ships' stores, when foreign cheeses are served, and such as are used in *French* ships almost exclusively of others."

JUDGMENT.

Sir *W. Scott*—There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a *Papenberg* ship carrying *Dutch* cheeses from *Amsterdam* to *Brest* or *Mortlaix* (*it is said*) but certainly to *Brest*? or as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of the naval equipment of the enemy.

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If I adverted to the state of *Brest* at this time, it might be no unfair addition to the terms of the description, if I noticed, what was notorious to all *Europe* at this time, that there was in that port a considerable *French* fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a *British* fleet which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply, to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered: but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir *R. Wiffen*, the then King's Advocate, upon a formal reference made to him, that by the practice of the *English* Admiralty, *corn*, *wine*, and *oil*, were liable to be deemed contraband. "I do agree," says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals; "that *corn*, *wine*, and *oil*, will be deemed contraband."

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These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of his Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to *Rochelle*, was condemned; how it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. *Swabey*, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to *Rochelle*, in the same year; in 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances shew that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favourable positions laid down upon this matter by *Wolfius* and *Vattel*, and other writers of the continent, although *Vattel* (a) expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or

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(a) *Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'enemi s'appellent marchandises de contrebande. Telles sont les armes, les munitions de guerre, les bois, & tout ce qui sert à la construction, & à l'armement des vaisseaux de guerre, les chevaux, & les vivres mêmes en certaines occasions, où l'on espère de réduire l'enemi par la faim.*
Vattel, book iii. ch. 7. sect. 112.

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the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case, they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence, by the practice of nations, is shewn, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although

although occasionally a frigate or other ships of war, may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

In the case of the *Eendragt*, cited for the claimant, the destination was to *Bourdeaux*; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation (a), in the same manner as *Brest* is universally known to be.

The Court, however, was unwilling, in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both

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(a) Agreeably to this distinction Dutch cheeses going from *Amsterdam* to *Bourdeaux*, on account of a merchant of *Altona*, were referred on further proof. *The Walvaren. K. Aug. 27, 1799.*

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parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in *British* ships, when foreign cheeses are used at all; and that they are exclusively used in *French* ships of war.

Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

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British mer-
chants are not
at liberty to
trade with the
enemy without
the King's li-
cense; all pro-
perty taken in
such a trade, is
confiscable as
prize to the
crown.

THIS was a case of a claim of several *British* mer-
chants for goods purchased on their account in
Holland, and shipped on board a neutral vessel.

The affidavit annexed to the claim set forth:—That Mr. Malcom of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with *Holland*, in the import-
ation of various articles of the produce of *Holland*, which

which were particularly wanted for the use of *Glasgow*, and essentially necessary to the agriculture and manufacture of that part of the kingdom; that, after the irruption of the *French* into *Holland*, they had constantly applied for and obtained special orders of his majesty in council, permitting them to continue that trade; that after the passing of the acts of parliament 35 G. 3. c. 15. (a) & 80., 36 G. 3. c. 76., 37 G. 3. c. 12. confirming and continuing the orders of council of the 16th and 21st of *January*, it was apprehended in that part of *Great Britain*, that by these acts the importation of such goods was made legal: but for the greater security, they still made application to the commissioners of customs at *Glasgow*, to know what they considered to be the interpretation of the said acts, and whether his majesty's licence was still necessary; and that in answer to such application, the merchants were informed, under the opinion of the law advisers of the said commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces would in future

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(a) The 35 Geo. 3. c. 15. (16th March 1795) reciting and confirming the orders of council of the 16th and 21st of *January*, (which allowed goods coming to ports of this kingdom directly from any port of *Holland*, and navigated in any manner, to be landed and secured in warehouses for the use of the proprietors till farther orders,) enacts, that it shall be lawful to import such goods belonging to subjects of the United Provinces, or to any who were subjects before the 19th of *Jan.* 1795, or to any subject of his majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue. The subsequent acts contain farther regulations for property coming from *Holland*, in the ambiguous situation of the two countries at that time.

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be entered without them ; and that in consequence of such information, they had caused the goods in question to be shipped at *Rotterdam* for their account ; ostensibly documented for *Bergen* to avoid the enemy's cruisers.

JUDGMENT.

Sir *W. Scott*—This is the case of a ship laden with flax, madder, geneva, and cheese, and bound from *Rotterdam* ostensibly to *Bergen* ; but she was in truth coming to a *British* port, and took a destination to *Bergen* to deceive *French* cruisers ; and as the claim discloses (of which I see no reason to doubt the truth) the goods were to be imported on account of *British* merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the commissioners of the customs in *Scotland* that they might be lawfully imported without any licence, by virtue of the statute 35 *Geo. 3. c. 15. &c. 80.*

It is said that these circumstances compose a case entitled to great indulgence ; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me ; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country ; it is laid down by *Bynkershoek* as an universal principle of law — *Ex naturâ belli commercia inter hostes*

hostes cessare non est dubitandum Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipse inditaciones bellorum satis declarant, &c. He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re sed, subditorumque suorum esse censent principes* (a). But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*.—It appears from these passages to have been the law of *Holland*; *Valin*, l. iii. tit. 6. art. 3. states it to have been the law of *France*, whether the trade was attempted to be carried on in national or in neutral vessels: it will appear from a case which I shall have occasion to mention (*The Fortuna*), to have been the law of *Spain*; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of *Europe*.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the

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(a) *Bynk. Q. J. P. book i. c. 3.*

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expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled in such a situation of the two countries to carry on his trade between them (if necessary) under the eye and controul of the government charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians

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a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour.—The same principle is received in our courts of the law of nations ; they are so far *British* courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy ; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice*. But otherwise he is totally *exlex* ; even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill ; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract ? to such transactions it gives no sanction ; they have no legal existence ; and the whole of such commerce is attempted without its protection and against its authority. *Bynkerboek* expresses himself with great force upon this argument in his first book, chapter 7. where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable : he says, that cases of commerce are undistinguishable from cases of any other species in this respect—*Si boſi ſemel permittas actiones exercere, difficile eſt diſtinguere*

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ex qua causa oriuntur, nec potui animadvertere illam distinctionem unquam si uis fuisse servatam.

Upon these and similar grounds it has been the established rule of the law of this Court, confirmed by the judgment of the supreme court, that a trading with the enemy, except under a royal licence, subjects the property to confiscation:—and the most eminent persons of the law sitting in the supreme courts have uniformly sustained such judgments.

In the *Ringende Jacob* 1747, *Andreas Laud Master*, a Swede, which went from *London* to *Bourdeaux* in ballast, there took in seventy-one tons of wine for *Mr. Minet*, *Mr. Challie*, and *Mr. Fetherstonbagb*, to be delivered at *Guernsey*, but with false clearances at *Bourdeaux* to deceive the enemy—condemned by the *Lords of Appeal* 7th of *Feb. 1750*, in affirmance of the judgment of the Admiralty.

In the *Lady Jane*, a *Hamburg* ship laden at *Mallaga* with mountain wine—Cargo claimed by *English* merchants, as the produce of goods sent to *Spain* before the war—condemned 13th *April 1749*; present *Lord President*, *Archbishop of York*, and *Baron Clerke*.

In the *Deergarden* of *Stockholm*—Woollen goods shipped ostensibly at *Lisbon*, voyage in fact to the enemy's port at *Bilboa*, but on *British* account.—Cargo condemned 15th *March 1747*.

In the *Elizabeth of Oxfend*—Cargo the property of *British* subjects, coming from an enemy's port—condemned 27th *Jan. 1749*; present *Duke of Dorset*, *Earl of Pembroke*, *Right Honourable W. Pitt*, *Mr. Justice Denison*, *Mr. Justice Clive*: held, “that a *British* subject cannot trade with the enemy, but that the
“only

" only punishment which the Admiralty can inflict
" was confiscation of the goods."

In the *Juffrouw Louisa Margaretba*, Lords, 3d April 1781, a case of a claim of Messrs. *Escott* and *Read* of *London*, for wines and other articles shipped on board a Dutch ship, April 7, 1780, at *Malaga*, for their account.

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The affidavit of claim stated:—That Mr. *Escott* was one of a house of trade, known by the name of *Escott* and *Read* of *London*; that they had for twenty years immediately preceding hostilities between *Great Britain* and *Spain*, carried on considerable trade to and from *Malaga*, and had an established house of trade at *Malaga*, where Mr. *Escott* had resided about thirty years preceding, excepting the last ten months, when he had left that place, and had since resided in *England*. It farther stated, that considerable quantities of wine and other merchandize belonging to the said house (deposited in vaults and warehouses set apart for the same) had been left at *Malaga* under the care of Mr. *Grivegnee*, a *Fleming* by birth, brought up in that house, who was suffered to remain to preserve the said goods during hostilities, unless a favourable opportunity should offer of sending them to *London*. It stated the destination to have been to *Ostend*, and the property to have been described for neutral account and risk, to avoid the enemy's cruisers; and claimed the whole as the entire property of the house of *London*, out of which Mr. *Grivegnee* was to receive 14 per cent. but no other emolument whatever.

The judgment of the Court of Admiralty rejecting the claim of Mr. *Escott* was affirmed; present
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the Earls of *Bathurst, Sandwich, Marchmont, Hillsborough, Clarendon, Viscount Stormont, Lord Grantham, Lord Loughborough* Chief Justice of the Common Pleas, Sir *Richard Worsley, Sir J. Goodricke, Sir J. Eardley Wilmot.*

In the *St. Louis*, alia *El Alleffandro*—Lords, July 18th, 1781, the case of a claim of Messrs. *Morgan and Mather* for certain peltries shipped by them on board a vessel of *New Orleans*, bound to *Bourdeaux*, and consigned to merchants there, on the proper account and risk of the shippers.

The affidavit stated the history of Mr. *Morgan* from the year 1764, when he left *England* to settle in *West Florida*, and his subsequent transactions from 1774 on the river *Mississippi*; where finding no troops nor any sort of protection granted by the *British* government to those settled on the *British* part of the banks of that river, he had kept a ship as a floating storehouse, living himself at *New Orleans* by permission of the governor, under an express condition that he should not land any sort of goods in any part of the *Spanish* dominions. It then stated: That in 1779, finding the *American* troops in such force all over the river as to prevent any *English* ship from coming up the river, and that it was impossible to make any remittances to *England* but by hiring neutral vessels, he shipped the goods in question on board the *St. Louis*, belonging to inhabitants of *New Orleans*, at that time neutral subjects, that being the only vessel at *New Orleans* bound to any port of *Europe*; that they were consigned to merchants at *Bourdeaux*, to be there sold, and the proceeds remitted to Mr. *Mather* in *London*; that he was obliged to resort

resort to this mode of remittance that the goods might not perish on his hands.

Annexed to the affidavit was a certificate of Colonel *Dickson*, the *British* commander in those parts, certifying that Mr. *Morgan*, a *British* subject, had received permission under the 12th article of the capitulation of *Baton Rouge*, to convey himself and family to *London* under a passport from the *Spanish* governor.

The sentence of the Court of Admiralty, condemning the ship and cargo as enemy's property, or otherwise liable to confiscation, was affirmed; present Earl of *Bathurst*, Earl of *Clarendon*, Lord *Loughborough* Chief Justice of the Court of Common Pleas.

In the *Compte de Wobronzoff*, Lords, 19th *July* 1781; a case of a claim of Mr. *Daly*, Mr. *G. Byrne*, and other *Irish* merchants, for the ship and certain quantities of *French* wines shipped at *Bourdeaux*, *May* 1780, on their account, with ostensible papers for *Russia*. It was stated in support of their claim—That during the whole of the war the commissioners of his majesty's revenue and excise in *Ireland*, had constantly permitted trade to be carried on from *Bourdeaux* to *Dublin*, in the same manner as it was before hostilities commenced; and all ships belonging to *British* owners, navigated according to law, with cargoes the property of *British* owners, coming immediately and openly from *Bourdeaux*, had been and still were ad-

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(a) In the *Victoria*; Lords, *July 20, 1781*. the property of this gentleman in the ship and goods sent from *New Orleans* *April 1779*, and consigned to *London* was restored.

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mitted to enter and invoice their cargoes from thence ; and that on all cargoes so entered the regular duties had been paid.

An act of parliament was recited, passed in *Ireland* in the 19th and 20th of his present majesty, by which it is enacted, that from the 24th of *June* 1780 till the 25th of *December* 1781, there should be paid an additional duty of 10*l.* 7*s.* per tun on all *French* wines imported into the kingdom of *Ireland* during the said period. The practice of admitting such cargo to an entry was proved by an extract from the entries office, by which it appeared that several cargoes of a similar nature had been permitted to enter :—and it was contended, that the act of the *Irish* legislature was decisive, as far as it was competent for them to decide, being made long after the commencement of hostilities ; as it could not be imagined that they would be inattentive to public affairs, or propose to draw a revenue from a trade prohibited and illegal.

The judgment of the Court of Admiralty, condemning the ship and cargo as good and lawful prize, was affirmed, and the appellant was condemned in the costs of the appeal ; present Earl of *Bathurst*, Earl of *Hillsborough*, Earl of *Clarendon*, Lord *Loughborough* Chief Justice of the Common Pleas.

In the *Expedite van Rotterdam*, Lords, 18th *July* 1782 ; a case of the claim of *Messrs. Gregory and Turnbull of London*, for a quantity of wine and other articles shipped on board a *Dutch* ship, *December* 20th, 1780, at *Malaga*, for them, though ostensibly for the account and risk of *Mr. Carl Thomaze of Amsterdam*, their agent, *Holland* being then at peace with this country.

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The affidavit of the claimant recited an act, passed in the 20th year of his majesty's reign, to permit goods the product or manufacture of certain places within the *Levant* or *Mediterranean* seas, to be imported into *Great Britain* or *Ireland* in *British* or foreign vessels from any place whatsoever; enacting, that from the 1st of *January* 1780, any goods which had been usually imported from any port or place in *Europe* within the *Straits of Gibraltar*, (with an exception respecting the dominions of the Grand Signior,) should and might, during the continuance of the said act, be imported and brought by any person or persons whatsoever into *Great Britain* or *Ireland* in any ship belonging to any State in amity with his majesty. The affidavit stated, that the importation had been in every respect conformable to the said act, and that the said goods were coming for the sole account, risk, and benefit of their house; being described in the bill of lading to be at the account and risk of *Carl Thomasz*, only to avoid the enemy's cruisers.

The judgment of the Court of Admiralty condemning these goods was affirmed; present Lord *Camden*, Earl of *Effingham*, and Lord *Abberbury*.

In the *Bella Guidita*, Lords, 20th *July* 1785, a case of a claim of Mr. *Vaughan* and other *British* merchants, sending a cargo of provisions on board a *Venetian* vessel from *Ireland* to *Grenada*, one of the islands then lately taken by the *French*.

“ The affidavit of claim set forth the particular situation of that and the other islands, since they had fallen into the possession of the *French*; that they were not considered by the *French* government as entirely *French* islands; that by a certain ordinance of the *French* king, it was

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ordained that the merchants and inhabitants of all or most of the conquered islands should, as to their trade and commerce, be upon the same terms and footing as the *British* merchants and inhabitants of the island of *Dominica*; that by the 17th article of the capitulation of the island of *Dominica* in 1778, it was permitted to the merchants of the said island, until peace, to receive vessels (except *English*) to their address from all parts of the world, without their being confiscated; that before *Dutch* hostilities broke out, the trade between the conquered islands and *Great Britain* had been carried on through the island of *St. Eustatius*, under the sanction of *British* acts of parliament, for the purpose of supplying the islands with provisions absolutely necessary for their subsistence; and of taking off the produce in payment to *British* merchants, as the only means of keeping down the interests due to them on mortgage on the plantations:

“ That after the *Dutch* hostilities, it became notorious to the *British* government, that the obstruction of this trade would be attended with very serious consequences to the *British* interests in the said islands; and under these considerations an act was passed in the 20th *Geo. 3.* reciting, That during the said hostilities the islands of *Grenada* and the *Grenadines* had been taken by the *French* king, but it was just and expedient to give every relief to the proprietors of estates in the said islands; and enacting, That no goods or merchandise of the growth, produce, or manufacture of the said islands, on board neutral vessels, going to neutral ports, should be liable to condemnation as prize.

That under this view of the necessitous situation of the said island, and of the favourable manner in which

it



it was considered by the government of this country, the claimants chartered this ship to carry out a cargo of provisions to *Grenada*, and bring back in return a cargo of the produce of that island ; that there was an ostensible destination to *St. Thomas* merely for the purpose of avoiding the enemy's cruisers."

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" The judgment of the Vice-Admiralty Court of *Barbadoes*, condemning the cargo as *French property*, was affirmed, and the appellant condemned in the costs of appeal ; present Lord *Camden* president of the council, Earl of *Effingham*, Marquis of *Caermarthen*, Viscount *Howe*, and Lord *Sydney* (a)."

1a

(a) The printed papers of appeal contain the following strong representation of the hardship of the rule, as applied to the circumstances of this case :—

" The appellants and intervenor in support of their case, beg leave to observe, that as the facts stand now disclosed to your lordships, the single question arises, whether it was so unlawful for a British subject to send supplies to the British plantations in the *Grenada islands*, whilst under the misfortune of a temporary subjection to the French, as that a confiscation of the supplies so sent should be the just and legal consequences of his misconduct ? and they humbly presume, that this question cannot possibly be answered in the affirmative by those who consider the favourable principles of the various acts of parliament relating to the British captured islands, the attentions of his Majesty's ministers to the relief of the proprietors, and the peculiar exigence of public affairs, which called both upon the legislature and the executive government to authorise special provisions for cases which happily have had but few precedents in the history of this country. . . .

" In the late unfortunate war *Great Britain* saw many of its valuable *West India* possessions fall into the hands of the enemy from its absolute inability to protect them. The proprietors being

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still British in principle and affection, and many of them by actual residence, and the hope being constantly entertained, as well by the public as by individuals, that these islands would soon revert to the dominion of their natural sovereign, the parliament, in the several cases of *Newn*, *Montserrat*, *St. Christopher's*, *Grenada*, and the *Grenadines*, expressly permitted the produce of those plantations to be conveyed to Europe free from British capture, under limitations intended merely to prevent the abuse of this permission by the clandestine extension of it to the produce of foreign colonies. In this provision the principle appears to be clearly recognised and established, *that these islands, though captured, were not to be considered as French*; for upon what other principle could British protection have been imparted to them? and if the British legislature did thus solemnly declare its intention to protect and encourage the produce of those plantations during the remainder of the war, upon what grounds of legal or political analogy can it be contended that it was criminal to transmit those supplies, without which those plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of necessary importation, without which the pretended permission of the other is merely nugatory and insulting?

" The conduct of his Majesty's executive government was no less favourable to the interests of the unfortunate British proprietors. Various applications to his Majesty's ministers on the behalf of these proprietors were always readily entertained and attentively considered; and the appellants had interwoven therein much too highly of the wisdom and integrity of his Majesty's servants to suppose, that whilst they were listening to every proposal for the relief of those islands, they were at that moment conscious to themselves that in truth they were only consulting for the better security of the property of the French."

" Upon the extreme exigence of public affairs at that period, the appellants and intervenors forbear to enlarge. It remains for your lord-

Alphen of Rotterdam, for a quantity of corn shipped on board a *Lubeck* ship in *December 1792*, from *Rotterdam* to *Nantes*.

It appeared from the evidence, that the ship was chartered for this voyage on the 6th of *December 1792*, and that the cargo was actually laden in the same month, but by various accidental delays, the ship was prevented from putting to sea till the 9th of *February*. Hostilities were declared by the ruling powers of *France* against *England* and *Holland* on the first of *February 1793*.

It was contended for the captors, that hostilities having been declared by the ruling powers of *France* against *England* and *Holland* on the first of *February 1793*, no cargo (much less a cargo so essential to the *French* as wheat) could lawfully be sent from *Holland* for *France*, on account of *British* and *Dutch* subjects, on the 9th of the same month; subsequent to which, this ship, with the cargo of wheat in question on board, set sail from *Helvoetsluys* for *Nantes*; and having been captured in such voyage on the 26th of

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lordships to decide whether these could possibly be the intentions of the *British* government; viz. That those islands should be condemned to absolute sterility by a refusal of such necessary supplies as the *French* from a partiality for their own islands, found it convenient to withhold from them; that the only practicable mode for the immediate collection of *British* debts, secured upon those plantations to an enormous amount, should be prohibited and punished; and that *Great Britain*, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider as its own, should lie at the mercy of the ancient markets of the enemy upon such terms as a lucrative monopoly would prescribe."

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that month, the cargo was rightly, justly, and lawfully condemned as prize to the *British* captors.

The sentence of the Court of Admiralty, condemning the whole cargo, was affirmed; present, Earl of Mansfield President of the Council, Lord Auckland, Sir Richard Pepper Arden Master of the Rolls, Sir J. Eyre Chief Justice of the Common Pleas, Sir W. Wynne, Charles Greville Esq.

In the *Fortuna*, Kock, Lords, 27th June 1795; a case of a claim of Messrs. Tupper and Drake, *British* merchants carrying on trade at *Barcelona*, for a quantity of wines shipped on board a *Swedish* vessel at *Barcelona*, Jan. 1793, and destined to *Calais*.

It appeared in evidence, that the ship was chartered for this voyage on the 11th of Jan. 1793, that she sailed to *Tarragona* and *Saloe*, (in which latter port she arrived on the 15th of February,) and completed her cargo, and sailed on her voyage to *Calais* on the 21st of March: the ship was taken on the 8th of April by a *Spanish* frigate, and released under this sentence of the *Spanish* Court of Admiralty:—That considering the vessel is under neutral colours; that the cargo does not consist of contraband goods; that the concerned do not appear other than merchants resident in *Spain*; *that the war was not declared against France* neither when she was laden or when she was detained, because it was on the 20th of March, and the last bill of lading appears dated at *Saloe* on the 15th of the said month, from whence she sailed on the 21st, they ought and did command the said brig to be set at liberty.

For the captors it was contended, that the ship was liable to confiscation, because she sailed from *Spain* for *Calais* many months subsequent to the commencement

ment of hostilities by the *French* against this country and against *Spain*; and because it was incumbent on the proprietors to have prevented the sailing of this ship from *Spain* for *Calais*, or to have shewn that every endeavour had been used for that purpose.

The sentence of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of *Mansfield*, Lord *St. Helens*, Sir *W. Wynne*, *Sylvester Douglas* Esq.

In the *Freeden*, Lords, *July 4, 1795*; a case of a claim of Messrs. *Herries, Keith, and Stembor*, of *Barcelona*, merchants, for a quantity of brandies shipped on board a *Swedish* ship at different *Spanish* ports, in the months of *March* and *April 1793*.

It appeared in evidence, that the firm consisted of Sir *Robert Herries* and *Charles Herries*, resident in *London*; *Alexander Keith*, a *British* subject resident at *Barcelona*; *George Keith*, a *British* subject resident at *Ostend*; and *Frederick Stembor*, a *Dutch* subject resident at *Barcelona*. The vessel was chartered on the 7th of *March* for *Ostend*. On the 14th of *March* she sailed from *Barcelona* to *Terrendembarra*, and from thence on the 23d of *March* for *Terragona*, where the cargo in question was completed; she sailed from thence on the 3d of *April*, and put into *Malaga* on the 6th of *May*; and proceeding on her voyage, was taken on the 2d of *June* by a *French* privateer, and re-taken on the 23d by the respondents.

On the former hearing leave was given to Sir *Robert Herries*, resident in *London*, to give proof that on the breaking out of hostilities they had taken means to prevent their being implicated in the consequences of an illicit commerce.—A letter was accordingly

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ingly brought in, written on the 12th of Feb. 1793, in which was this passage:—We have learnt with certainty the declaration of war in *France* against this country and *Holland*, as well as the actual commencement of hostilities by the capture of several of our trading vessels; in consequence of which letters of marque and general reprizals are granted here against all ships and goods belonging to *France*, or to any persons, being subjects of *France*, or inhabiting within any of the territories of *France*.

The judgment of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of Mansfield Lord President of the Council, Sir Richard Pepper Arden, Sir W. Wynne, Sylvester Douglas, and Charles Greville, Esqrs.

In the *William*, Lords, Dec. 19th, 1795; a case of a claim of Messrs. Munro, Macfarlane, and Co. of *Grenada*, for a quantity of sugars shipped on their account at *Guadaloupe* in June 1793.

It appeared from the claimant's affidavit, that for some years prior to the war a trade had been carried on by the merchants of the *British* islands, supplying the *French* islands with slaves, on credit, to receive payment in sugars of the ensuing year. That there was, on that account, always a considerable debt due to them from the *French* merchants. That the sugar in question had actually been received at *Guadaloupe* by the agent of the claimants, for slaves sold on their account prior to the war.

The judgment of the Vice-Admiralty Court of St. Christopher, condemning the ship and cargo, was affirmed;

affirmed (a); present, Earl of *Mansfield* President of the Council, Lord *St. Helens*, Sir *Richard Pepper Arden* Master of the Rolls, and Sir *W. Wynne*.

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(a) In this case, the extreme hardship of the rule contended for, was strongly urged by Dr. *Nicholl* now King's Advocate, and Mr. *Stephen*, as applied to the situation of the present claimants: It was argued, that there were no other means of obtaining a remittance, as payment by produce was the usual mode of dealing as well in the *English* as the *French* islands; that they were too remote from the seat of government to obtain a license from *England* in time, and that there was no authority in the *West Indies* competent to dispense with the rule contended for; that to deny the claimants this mode of getting off their effects was to maintain that they were absolutely bound, without any alternative, to leave them in the hands of the enemy; that this distinction arose between the present case and former precedents, that there was in this case no accommodation to the enemy, but rather an impoverishment, in taking out of their reach valuable articles for which no farther compensation was to be made; that it differed therefore from cases of exporting to the enemy's country, or of importing from thence for reciprocal profit; that the commercial treaty between *Great Britain* and *France* allowed a month after the breaking out of hostilities for the removal of property from the enemy's country; that the present shipment was within that period after the time when notice of the war first arrived in those parts; and that if *British* subjects were not permitted by their own government to avail themselves of the favourable stipulation of the treaty, it became a snare rather than a protection to those who were induced to engage in trade on the faith of it.

For the Captors—All question respecting the property which had been contested in the court below, was given up by the then King's Advocate Sir *W. Scott*; and the case was expressly placed on the ground, that the claimants being *British* or *Dutch* subjects, were taken in the act of trading with the enemy contrary to their allegiance. The case of the *Lady Jane* in 1749, in which the produce of goods sold in the enemy's country before the truce,

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I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established, that no one case exists which has been permitted to contravene it.—For I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced:—where acts of parliament have on different occasions been made to relax the navigation-law and other revenue-acts; where the government has authorised, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claims not merely of convenience but of necessity excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been

and that of the *Juffrouw Margaretha*, where wines left in store, and afterwards shipped in specie, were condemned, were relied on. It was expressly contended, that there was no difference between *going to* or *coming from* the enemy's ports; as they were equally acts of commercial intercourse with the enemy, which by the law of war was universally prohibited; that the power of the crown to dispense with this rule, in particular cases, was a sufficient answer to every objection, on the ground of hardship; and that the allowing of a commerce with the enemy, even for the specious purpose of withdrawing property without such previous license, would be opening a wide door for treasonable communications with the enemy.

enforced

enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle which allied states in war had a right to notice and apply mutually to each other's subjects. Indeed it is less necessary to produce these cases, because it is expressly laid down by Lord *Mansfield*, as I understand him, that such is the maritime law of *England* (a); and he who for so long a time assisted at the decisions of that court, and at that period, could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess prove him to have been personally present at those particular judgments. What is meant by the addition "but this does not extend to a neutral vessel," it is extremely difficult to conjecture, because no man was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation; and therefore I cannot but conclude, that the words of that great person must have been received with some slight degree of misapprehension.

What the common law of *England* may be, it is not necessary, nor perhaps proper for me to inquire; but it is difficult to conceive that it can by any possibility be otherwise, for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently

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(a) *Gift v. Mason*, 1 T.R. 85.

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upon the water, merely in consequence of the insular situation of this country. But when an enemy existed in the other part of the island, (the only instance in which it would occur upon the land,) it appears, from the case referred to by that noble person, to have been deemed equally criminal in the jurisprudence of this country.

The general rule of law being in my apprehension clear, it is only to be inquired, whether there are any distinctions which take this case out of the application? and I need not add that these must be legal distinctions, and not such as present mere considerations of indulgence and compassion—or mere considerations of the utility of the particular commerce; for to these the Court has no power to give way. A reference has been made to the statutes.—It is not argued that the statutes will, in the just apprehension of them, authorise such a trade, but that they might have led to an innocent mistake on the subject. These statutes, it is admitted, were made to apply only to the property of persons in *Holland*, while hostilities were impending. It was necessary that some provisions should be made for the security of the loyal *Dutchmen* who might migrate to this country. It was found necessary, on this account, to relax the navigation-laws; and for this purpose an order of council first issued, which was afterwards confirmed by these acts, as necessary to support the order and protect those who acted under it, but merely with respect to property so circumstanced. These were mere Custom-house regulations, and nothing else; and it is impossible to entertain a doubt respecting the interpretation of them.

It

It appears that these parties had before applied to the council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information: instead of doing so, they consulted the commissioners of the customs, very proper judges to ascertain what goods might be imported under the revenue-laws: but this is a matter of general law, on which they are not the persons best qualified to give information or advice. The intention of the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away. The same pleas were urged, and with equal reason, for Mr. *Escott*, and in many other cases: but it has been decided by a court which has much greater power of construction, that such pleas could not be sustained. I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe: but the Court has no power to depart from the law which has been laid down; and I am under the necessity of rejecting the claims.

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Freight and expences were given to the master.

On application that the Court would decree the expences of the claims to be paid out of the cargo, it was contended, that there was no instance in which the Court had done this, but in cases of recapture.

The Court directed the expences to be paid.

* * * Jan. 10th, 1800. In the *Nelly*, *Perrie*; a case of a British subject trading with *Holland* without license.—*Lawrence* took an exception to the form of the condemnation; and submitted that it

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it nowhere appeared that the individual captor was entitled to the benefit of such a seizure; that it was not given to him by the French nor by the Spanish prize-act; that the Lords had reserved the question in the *Etruso*, whether that part for which the claim of a British subject was rejected, should be condemned to the Crown or to the captors; that the Court might, perhaps, exercise the discretion of condemning to the Crown, by which means the Crown would be enabled to relieve its bounty the hardships that often occurred in cases of this kind.

Court.—The same course of decisions, which has established that property of a British subject taken trading with the enemy, is forfeited, has decided also that it is forfeited as prize. The ground of the forfeiture is, that it is taken adhering to the enemy, and therefore the proprietor is *pro hac vice* to be considered as an enemy.—It is impossible for me not to pronounce that this property is forfeited, and forfeited as prize. The illegality of trade in the case of the *Etruso*, was of a different nature, that being a trade in violation of the charter of the *East India* company.

IN THE INSTANCE OR CIVIL COURT OF
ADMIRALTY.

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A British vessel
sailing without a
British register
from circum-
stances of neces-
sity, decreed not
to be forfeited
under the navi-
gation acts.

THE BETTY CATHCART, GILLESPIE Master.

THIS was a case of an appeal from a condemnation
on the Revenue Laws.

JUDGMENT.

Sir W. Scott.—This is a proceeding on the revenue laws, brought by appeal from the Vice-Admiralty Court of *Jamaica*, where this ship has been condemned to the Crown, the governor, and seisor, for

for being found sailing without a register. The proceedings are conducted by the private seisor only, who has unquestionably a right to sustain such a suit without any active concurrence of the two other parties.

The revenue and navigation laws are certainly to be construed and applied with great exactness, they are framed for the security of great national interests; and the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships: At the same time it is not to be said that they are not subject to all considerations of rational equity. Cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or has acted, at least, for the best, must be considered in this system of laws, just as in other systems: Laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men—or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. The Court therefore will not deem it a departure from the duty of legal interpretation in such cases, to give a fair attention to considerations of this nature.

The state of war is, in some degree, likewise to be considered as forcing men into situations which they did not choose for themselves, and in which they must act under the pressure of difficulties on different sides.

The present case is, in its general appearance, of a favourable aspect; it has no symptom of fraud; there is no attempt to impose; this alone it is true would not be sufficient; for it certainly may happen that a *bond fide* case may incur the penalty of the law, and

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may become the victim of a general policy, anxious to prevent the possibilities of fraud, and therefore active in prohibiting modes of dealing which are grossly liable to abuses of that kind, though the particular transaction may not be directly impeachable.—It is favourable too in another respect, as it is the case of a neutral merchant standing forward and encountering risk for the protection of *British* interests. The ship had been a *British* vessel taken by the *French* and carried into an *American* port. The *British* consul interposed, and the subordinate Court in *America* determined, in perfect consistence with the laws of neutrality, that it was a capture unlawfully made in violation of their particular neutrality, and restored the vessel. An appeal was prosecuted to the Superior Court, and it was agreed, to prevent the destruction of the vessel by its rotting in a harbour during the pendency of this appeal, that the ship should be sold and the proceeds should remain to abide the event of the ultimate adjudication. In this state the vessel was purchased by a Mr. Penman of *Charles-Town*, according to his declaration, for the former owners, if they elected to take it; otherwise for *Simpson* and *Davison*, *British* merchants, correspondents of his in *London*, in whose names and on whose account it was actually purchased. Mr. Penman then applied, by means of the *British* consul, who witnesses the whole of the transaction, to the *French* consul for the ship's register and other documents.—The *French* consul refused. Application was made to the *American* court which had decreed the sale, to compel a delivery of the *British* papers, but the *American* court declined interfering to that effect, upon the application of the *British* consul, who certifies the fact, and puts his certificate

tificate on board, stating what had passed, and that the “*ship is and continues a British bottom*, and that he does this for the security of *British* owners.” The ship, thus deprived of her papers, sails with a *British* master and crew, and with a quantity of lumber on board, to *Jamaica*, for the purpose of joining the convoy that was to carry her and other vessels to *Great Britain*, where her owners lived. The ship was there seized for a breach of the revenue laws; a claim was given by *Penman* for *Simpson* and *Davison*, the persons in whose name she was bought, and who have signified their acceptance of the purchase, but the claim was rejected and the vessel condemned.

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The principal questions are two: first, Whether this vessel was not at this time to be considered as the property of *Penman*? and secondly, Whether, sailing without a register, she is not liable to condemnation, let her belong to whom she may?

The account given by *Penman* in his claim is, that being the correspondent of the original owner, and also the correspondent and confidential agent of *Simpson* and *Davison*, he bought, not in his own name, but for *Simpson* and *Davison*, reserving, however, an option for the first proprietors. The principal document in proof thereof, is the certificate of the *British* consul, declaring that she was bought in the names of *Simpson* and *Davison*, and for their use; but no mention is made of the former owners, for whose prior use *Penman* intended it, if they thought fit to accept; and the question that naturally occurs is, why, with this intention, he did not rather buy in their names? The explanations given are, that *Penman* was more connected with *Simpson* and *Davison* than with the others, and had a larger authority from

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them ; and besides, that it was possible that the former owners might elect to abandon her to the insurers, which right he meant to preserve to them. These explanations are consistent, and account for the mode of conducting the transaction. That it was the intention of the party in buying this vessel to buy for *British* parties at all events, is strongly guaranteed by the circumstances that attended and followed the purchase.—He purchases publicly in their names, with the knowledge of the consul ; he applies immediately to the *French* consul for the *British* documents, and institutes a suit to compel the delivery. It is objected that the application ought to have been made to the Superior Court for this purpose ; and, strictly speaking, it ought ; but the *British* consul seems to have thought otherwise, and to have deemed the refusal on the part of the Court which decreed the sale to be fully sufficient. And indeed when it is considered that the *French* consul declared it to be his determination to send these papers to *France*, for the use of the tribunals there, it is no wonder that an attempt to obtain them by the authority of the Superior Court in *America* was abandoned. Another circumstance, tending strongly to support the reality of the transaction, is, that he sends this vessel immediately to a *British* port, consigned to *British* merchants there, with express orders to send her on to *Great Britain* under the convoy ; and the ship immediately on her arrival in *Jamaica* is declared at the custom-house to be in the circumstances described.—Upon the view of all these facts, I cannot but think it would be hard to bind down this property upon the *American* merchant, who made the purchase for the

benefit of *British* interests, merely to expose him to the penalty, which under our revenue laws would attach upon an *American* vessel carrying any goods to *Jamaica*.

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It is objected, that whatever the vessel was in the intention of the parties, she was nevertheless, in fact, *American*, because it did not appear that *Penman* had an authority from *Simpson* and *Davison* to buy, and therefore that they might have declined accepting her. He describes himself as their correspondent, confidential friend, and agent, and the consul describes him as their agent; and when it is considered that he sends this ship to a *British* port, with a full disclosure of all circumstances, it must be presumed that he *conceived* himself to possess a competent authority, *and that he actually was in possession of a sufficient authority*; to support such an intention, the Court would be inclined to presume everything in the fact, as well as in the apprehension of the party, that was not directly contradicted by the evidence.

The next consideration is, whether she would not be liable for sailing without a register, even supposing she was *British*. In fact she has no one document but the certificate of the consul, stating the circumstances of the case, and declaring her to be a *British* vessel. And, unquestionably, a ship unprovided with all documents, and particularly with a *British* certificate of registry, would be liable to condemnation, unless the occasion of this defect of documents was such as to afford a reasonable ground of exception to the general operation of the revenue laws. When I describe the present case to have originated in the accidents of war, and the conduct of the parties to

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have been controuled by an unavoidable necessity, I think I describe a case that furnishes a solid ground of that nature. The ship is carried in as prize, the documents are all taken away, the *American* merchant steps forward for the *British* interests, he purchases the vessel for them, he applies for the documents and invokes the aid of justice to obtain them, but without effect. What was he to do? He had only the choice of two measures—to keep her in port till other documents could be procured from *Europe*, or send her on to *Europe* without documents, but with papers properly authenticated, explanatory of her real situation. In these circumstances she is directed to sail—a *British* built vessel—purchased for *British* owners—and navigated according to law in all respects, but in the want of these documents which could not be procured. It is objected, that she is not dispatched immediately to *Great Britain*, the country of her owners, but to *Jamaica*.—She goes there, however, for the purpose of coming under convoy to *Great Britain*, and I do not think that the rule which requires that a ship, which has lost her certificate shall go *direct* to the country of her owners, excludes a reasonable attention to the *security* of that voyage. It is objected, that she had a cargo of lumber on board; but I am not acquainted with any case in which the rule has been laid down, that a *British* ship, going upon an occasion of this kind, must go in ballast, and must not carry any goods on board.

I am to add to all these considerations, that the foreign merchant in this case will be the sufferer, if the condemnation is sustained. The original owners will be secured by the proceeds of sale remaining in the *American*

American court. Looking to the motives under which the *American* merchant acted, and to the authority by which his conduct was directed, and making some allowance for ignorance of *British* law, I think it reasonable to be content with less circumspection and less regularity than might be required from other parties and under other circumstances. I shall therefore reverse the sentence; but as the case is not without its legal difficulties, I shall certainly give no costs against the seizor, who had a full right to take the opinion of the Court,

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THE REBECKAH, THOMPSON Master.

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THIS was a question of interest on the capture of a vessel made from the island of *St. Marcou*, whether it should be condemned as a Droit of Admiralty or to the captor.

For the Admiralty, the Adv. of the Admiralty and Laurence—The circumstances of the capture are: That this vessel, on putting into *St. Marcou* for safety, was fired at from the fort, and immediately struck her colours: That she continued to ride there a whole day before possession was taken; that it was at last taken by a boat's crew coming off from the fort.

These facts, it is presumed, are sufficient to establish the claim of the admiralty, as the law gives the benefit of all captures made in roadsteads, creeks, or havens, and on anchorage ground, to the lord high admiral, as his *peculium*.

A capture made by the crews of king's ships stationed at the island of *St. Marcou*, adjudged to be not a Droit of Admiralty, but prize to the actual captor.

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The case of the *Trautmansdorff*, in which the Lords decided against the claims of the admiralty, differs materially from the present, as that capture was made in the open sea, off the bold shore of *St. Helena*; it was, besides, doubtful in what manner possession was first taken; whether by a boat from the *Powerful*, or by the act of firing a shot from the fort. In this case it is not disputed that the surrender was made to the fort long before any boat went off to take possession. In a case of a capture made by the garrison of *Gibraltar*, the *Nostra Signora del Carmen* (a), it was condemned as a Droit of Admiralty. In this case it is an additional circumstance in favour of the claim of the admiralty, that the island of *St. Marcou* is certified to be peculiarly under the direction of the admiralty; on these grounds, it is submitted, the prize is to be condemned as a Droit of Admiralty.

For the Captors, the King's Adv. and Arnold—In this case there had been a mistake in praying condemnation to the crown; but it has been rectified, and the individual captors are now the parties before the Court. Against either, the admiralty can have no claim. The capture was made by naval officers, in their naval character—and therefore, *prima facie*, it is acquired to the king, and through him to the actual captors. The proof therefore must lie with the admiralty to take this case out of the general rule. But

(a) The *Nostra Signora del Carmen*, *Bregnante* master, laden with wine and oil, seized in the harbour of *Gibraltar* by order of Colonel *Roger Elliot*, lieutenant-governor; "ship and cargo condemned to the lord high admiral as perquisites of admiralty."—*Adm. June 25, 1708.*

the

the asserted facts are not established by the evidence. It is by no means proved that the vessel was at anchor at the time of capture, as it is rather intimated by the expressions of the witnesses; that she struck her colours before she came to an anchor. If there was, however, proof of that fact, it by no means follows that this capture would be to be considered as a Droit of Admiralty: there is no pretence to say that the place of capture was a port or haven: it is merely a straignt running between the island and the *French* coast: is rather an anchorage-ground off the island of *St. Marcou*, than a port or haven within its limits. By the decision of the *Trautmansdorff* it is clearly settled, that an intention to come in is not sufficient; there must be an actual coming in to support the claim of the admiralty. No such thing is proved in this case; and, therefore, the condemnation must pass in favour of the actual captors,

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JUDGMENT.

Sir *W. Scott*—The general question arises upon the capture of a vessel at the isle of *Marcou*, effected with considerable exertions of gallantry and perseverance by the crews of the *Sand-Fly* and *Badger*, stationed in and near that little island—and it is a question of interest between the lord high admiral, or, as in modern times it is more usually expressed, the king in his office of admiralty, representing that great officer, and the naval captors standing upon the general claim of prize, under the proclamation and the prize acts of parliament.

The rights of the lord high admiral are of great antiquity and splendour; and are entitled to great attention and respect; and certainly to full as much in this court as in any other place where they can possibly

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sibly come under consideration. At the same time, it is not to be understood that an extension of these rights beyond their absolute limits is to be favoured by construction; they are parts and parcels of the ancient rights of the crown communicated by former grants to that great officer, under a very different state and administration of his office from that which now exists in practice.

All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments, are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away. It is not improper for me to add, that the particular circumstances of the present case, which imply great merit of active exertion on the part of the captors, would certainly not dispose the Court to lose sight of this general rule in considering this question of interest.

The grant to the lord high admiral (evidenced as it is by the orders in council of 1665 (a), and by the
sub-

(a) The following is a correct copy of those orders:
At a council held at Worcester-house the 6th of March 1665-6.

PRESENT,

The King's most Excellent Majesty,
His Royal Highness the Duke of York,
His Highness Prince Rupert,
Lord Chancellor,
Duke of Albemarle,

Earl

subsisting practice,) gives him the benefit of all captures by whomsoever made, whether commissioned
or

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Earl of Lauderdale,
Lord Fitzharding,
Lord Arlington,
Lord Berkeley,
Lord Afsley,
Mr. Secretary Morice,
Sir William Coventry.

Whereas through the long intermission of any war at sea by his majesty's authority, several doubts have arisen concerning certain rights of the lord high admiral in time of hostility, the determination whereof appearing very necessary for the direction, as well of his majesty's officers as of those of the lord high admiral; upon full hearing and debate of the particulars hereafter mentioned, the king's counsel, learned in the common law, and likewise the judge of the High Court of Admiralty, and those of his majesty's and his royal highness the lord high admiral's counsel in the said High Court of Admiralty, being present, his majesty, present in council, was pleased to declare:

1st. That all ships and goods belonging to enemies, coming into any port, creek, or road, of this his majesty's kingdom of *England* or of *Ireland*, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the lord high admiral; but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven in, and forced into port by the king's men of war, and also such ships as shall be seized in any of the ports, creeks, or roads, of this kingdom, or of *Ireland*, before any declaration of war or reprizals by his majesty, do belong unto his majesty.

2^d. That all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the lord high admiral.

3^d. That salvage belongs to the lord high admiral for all ships rescued.

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or non-commissioned persons, under certain circumstances of situation and locality—that is, “*of all ships and goods coming into ports, creeks, or roads of England or Ireland, unless they come in voluntarily upon revolt, or are driven in by the king's cruisers.*” Usage hath construed this to include ships and goods *already come into ports, creeks, or roads*, and these not only of *England and Ireland*, but of all the dominions thereunto belonging. But I can by no means agree to the position that has been laid down, that wherever a ship can find anchorage-ground, there is a *road* or *roadstead* within the meaning of this grant. For if that were so, the lord high admiral would be entitled to all captures made within a moderate distance of most parts of the coasts of *England and Ireland*, and the foreign dominions belonging to them; which, assuredly, is not the case; for who would say, that if a ship at anchor in the channel of *Dover* is seized by a commissioned cruiser, the admiral is entitled? Every anchorage-ground is not a *roadstead*—a *roadstead* is a known general station for ships, *statio tutissima nautis*, notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself. The very expression of “*coming into a road*” shews, that by

4th. That all ships forsaken by the company belonging to them are the lord high admiral's, unless a ship commissionated have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissionated, then in the same company, and in pursuit of the enemy; and the like is to be understood of any goods thrown out of any ship pursued.

road

road is meant something much beyond mere anchorage-ground on an open coast. When it was laid down in the *Trautmansdorff*, that it was not necessary that the ship should be actually entered, and that it was enough if she was *in ipsis fauibus* of the port, creek, or road, it is evident that the words, ports, creeks, or roads, have a signification intimating certain known receptacles of ships, more or less protected by points and headlands, and marked out by limits, and resorted to as places of safety.

How far *St. Marcou* has a road that will at all satisfy this description, may be questioned.—The witnesses talk of a road, it is true; but it should seem that these small and barren rocks enclose no portion of the sea that can be strictly so considered.—It is a pretty open straight running between them and the coast of *France*, where ships may ride as they may do in other open parts of the *French* coast. It might likewise admit of a question, how far such a mere naval station, without inhabitants, and without government, either civil or military, as in truth it is, and merely occupied for the temporary convenience of these gun vessels and their crews, is so far a recognised possession of the crown of *England* as to come within the intention of the grant, which, according to the letter and my apprehension of its meaning, cannot travel beyond the ports, creeks, and roads of *England* and *Ireland*, and the *dominions* thereunto belonging.

Laying these questions, however, out of the case, the first question that will occur applies to the time of the capture, whether that is to be dated from the actual taking possession, or the previous striking of the colours; and I think that the striking of the colours

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colours is to be deemed the real *deditio*. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered. But as that attempt failed, I am of opinion that the act of formal submission having never been effectively discontinued, must be deemed the consummation of the capture—and if so, the next question will be, where the vessel was at the time that this act took place? And this is proved to have been, “when she was about to go into the road to anchor there;” for such is the expression of the witness upon the third interrogatory (a); which points more immediately to the place of capture, although on the 29th, which is pointed only to the general course of the vessel upon her voyage, he says, “She put into the road there.” The 2d witness describes her merely “as passing by the isle of Marlow at the time,” and the third says, in the language of the first, that “she was about to go into the road to anchor there.” Clearly, by all their descriptions, she had not entered the road, and she was under sail at the time she struck her colours. In point of locality, then, the claim of the admiral is not founded; for she was not *in ipsis faucibus*; she was *about to enter*, but was not *actually entering*, and that is the point at which the admiralty-right commences.

The claim, therefore, of the admiralty must be supported, if at all, upon the other ground, *viz.* that

(a) Under an intimation that it would be convenient to the reader to be able to turn to the interrogatories, to which the discussion of evidence frequently refers, the Editor has annexed a copy of them in the Appendix.

this

this was a capture made from the land, and by a land force, and therefore not a *maritime* capture, by persons commissioned to take for their own benefit—and I think it is proved that the striking of the colours was compelled by a firing from the shore, and that a boat was sent from thence to take possession. Now upon this subject I entirely accede to what has been laid down, that a capture at sea made by a force upon the land (which is a case certainly possible, though not frequent) is considered generally as a non-commissioned capture, and enures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of *Dover*, or other garrisoned fortress upon the land, that ship would be a *Droit of Admiralty*, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize-interest under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take upon that element for their own benefit. I likewise think, cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, such as may be met with in many parts of the

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the coast, and by means of such battery or fort compelled such a ship to strike; I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a Droit of Admiralty, and nothing more; and therefore I do not think it quite enough to say that the persons here were naval commissioned persons, and consequently entitled to the benefit of all property taken upon the sea.—But I think that the peculiar nature and quality of the place where the capture was effected, is to be added to the consideration. What is *St. Marcou?* It is stiled a *garrison* and a *fort* by one or two witnesses, but inaccurately; for it is certified by the commander in chief, that there is no garrison nor any military establishment whatever—it is a mere naval station, used for the temporary accommodation of the crews of these ships of war. There is not a person upon it who is not borne upon the ship's books, and who is not a part of their crews—they have the ship's pay—the ship's victuals—and the ship's officers to command them; the blockhouses which they have constructed are mounted with their own ship-guns, with the addition of a few spare guns otherwise procured. The whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected and so employed, is hardly to be considered as any thing else than as a part or appendage of the naval force; it is a sort of stationary Tender, rather attached to and dependent upon these vessels, than having the vessels attached

attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress possessed by a military garrison.—The capture then was effected by naval commissioned persons, using a force immediately subject to their use; and from its peculiar circumstances sufficiently naval in itself to be distinguished from an ordinary land force, subject to military persons. It is a maritime capture, effected regularly by a maritime force, and in a spot where the right of the admiralty had not yet commenced upon the thing itself at the time of the surrender.—And upon these grounds I shall pronounce for the claim of prize, under the king's proclamation and the prize acts.

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THE SARAH CHRISTINA, GORGENSEN Master.

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THIS was a case of a *Swedish* vessel going to *France* with contraband articles, and failing under a colourable destination to a neutral port.

JUDGMENT.

Sir *W. Scott*—This is a case of a *Swedish* ship laden with tar, pitch, iron hoops, and bars, and bound ostensibly to *Cagliari*.

The ship and cargo are claimed for the same person. The ship appears clearly to be *Swedish* property. But there are considerable doubts on the property of the cargo. The master swears “the claimant is the lader, and he believes the owner;” a

Pre-emption of
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cles substituted,
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fiscation, by the
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very diffident manner, surely, of verifying the property of a cargo, which is asserted to belong to his own owner.—Amongst the papers which describe the property, there is a charter-party as formal as any can be. It may, perhaps, not be uncommon for a person owning both ship and cargo, to have something of a charter-party, for the purpose of keeping distinct accounts of the respective profits of his ship and of his cargo—but why such stipulations should be introduced into a contract between a man and himself, as are to be found in this instrument; why a sworn broker should intervene for the drawing of this contract, and a magistrate, who is to authenticate the signature of this broker, is not so easy to explain.—Certainly the mere purpose of a man's keeping his own private accounts does not in any degree explain it. I observe too, that the freight is to be paid at the port of delivery, by the person to whom the cargo is to be delivered—rather an unusual condition of a contract executed merely for the purpose of keeping accounts which are to be finally settled by the individual himself. This charter-party and manifest are both signed by this broker—and I observe, that the broker's name is the same with that of the *French* vice-consul, who attests some of these documents. Such a circumstance, though much too slight to lead to any conclusion, yet, connected with the other circumstances, may suggest something of a presumption, that *French* interests might be concerned here, particularly if it turns out that the real destination of this cargo was to *France*.

If the cargo had been really going to *Cagliari*, although it was the property of Mr. *Kock*, the *French* consul,

consul, yet being, as to his mercantile character, a trader of *Udivalla*, and his mercantile character being unaffected by his consular character, he would have a clear right to trade to the same extent as any other merchant of that place, and consequently to carry pitch and tar to a neutral port. But the neutral destination, which is held forth in all the papers, is discredited by the fact of her being taken going into *Cberbourg*; to say nothing of the provisional instructions which are elaborately framed for the case of her being carried into any belligerent port.—The master is then empowered to sell the whole of his cargo—he is even to offer it to the government for sale—in short, the event of her delivering her cargo in a belligerent port is as minutely provided for as if no other port had ever been in the contemplation of the parties. The great fact, however, is, that she was going into *Cberbourg*; and the explanation given by the master is, “that she was obliged to put into that port for water.” The experience of this Court has not taught it much respect to such explanations generally; and the circumstances of the present case rather fortify the result of that experience. Two circumstances in particular weigh much with me; the ship had left her port of *Udivalla* on the 8th of November, and she is seized on the 17th of the same month. She had, therefore, been only nine days from her port of clearance when this necessity arising from the failure of water commences. Now that a ship meaning, *bond fide*, to go from *Udivalla* in *Sweden* to one of the southernmost points of *Europe*, should either not lay in more water than was sufficient for nine days use, or should not secure that

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water in a sufficient manner relatively to the length of such a voyage, is highly improbable.—The master says he took in 18 casks at *Udivalla*, and six were emptied by use and leakage, and that some of the remainder were leaky; and the mate echoes him to a letter; but the boatswain knows nothing of the matter, for he swears “ that the course was altered to go into *Cherbourg*, but he can give no account why it was so altered;” and this is the second circumstance I allude to; for it is most extraordinary that such a necessity, as is pretended, should exist on board this ship, and yet be unknown to the crew—they were all engaged to go to *Cagliari*, an extreme failure of their stock of water compels them to go into a *French* port.—Is it possible to conceive that such a change of the voyage should take place upon such compulsion, and yet that the cause should be so totally a secret, locked up within the possession of the master and mate, as not to be known to this man, who was a sort of officer on board this vessel?

It is said, that if the truth of this account is doubted, there might have been a commission of inspection. But what would that prove? If there was a fraud intended, it would be natural for the parties to take care that the state of the casks should not detect it. They would be emptied of course. Therefore this could have given no satisfaction; nor are there any means by which it could be satisfactorily proved that there was no fraud. To me the fraud appears sufficiently demonstrated by all the circumstances: and I desire neutral masters to take notice, that where a fact of deviation into an enemy’s port is clearly proved, it will be no easy thing to purge away that fact by explanation;

planation; for in the nature of the thing, the explanation must generally come from themselves only; and coming from themselves alone, comes from a quarter exposed to suspicion, arising from the fact itself; and the general inclination of the Court will therefore be, (though subject to reasonable exception,) to take the clear fact against the dubious explanation.

I consider this, then, as the case of a *Swedish* ship carrying pitch and tar to a *French* port, under a pretended neutral destination. What will be the effect of such conduct? Pitch and tar are now become generally contraband in a maritime war: they have been condemned as such by the highest authority in this country. In the practice of this Court there is a relaxation, which allows the carrying of these articles, being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce.—But in the same practice, this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for pre-emption—no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility.—To entitle the party to the benefit of this rule a perfect *bona fides* on his part is required.

It is asked, why should a real destination to *French* ports be concealed, if the neutral has a right to carry these avowedly? Clearly to give the *French* market a greater security. If pitch and tar are going, avowedly,

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to the enemy, they may be brought in for pre-emption; but if papers, holding out a neutral destination, are put on board, this right is eluded, and the enemy is commodiously and securely provided with the instruments of war. The cruiser can only examine to satisfy himself of the fact of the destination; but he cannot detain without a responsibility in damages. The false representation, therefore, is not useless for the purposes of mischief: it is the passport and convoy for noxious articles to the ports of the enemy.

I am of opinion, then, that this cargo, consisting of some articles contraband in their own nature, and going to the enemy's port under a total absence of that fair conduct which ought to have been maintained in order to entitle it to the benefit of the more favourable rule, is subject to condemnation. With respect to the ship; if I was satisfied that the ship and cargo belonged to the same person, I must condemn that also, upon the ordinary rule, which extends the penalty of contraband to all the property of the same owner, involved in the same unlawful transaction. But I shall restore it under the strong doubts which I entertain, whether the cargo is not, in fact, the property of other persons, I mean *French* agents; for I suspect it, on the grounds mentioned above, to have been a *French* speculation throughout. In giving the owner of the ship any benefit from these doubts, I am, perhaps, practising a lenity which would require more apology than, upon strict principle, I might find easy to furnish; but I shall content myself with the restitution of the ship, withholding, as usual on the carriage of contraband, the allowance of freight and expences.

THE JONGE JACOBUS BAUMANN,
MULLER Master.March 3rd
1799.

THIS was a case of a ship proceeded against as prize, by persons taken on board from a stranded vessel.

JUDGMENT.

Sir W. Scott—This is a case of a particular nature, arising, principally, on the affidavit of a neutral master; I shall therefore first consider the affidavit.

He states, “ that he was master of the ship *Jonge Jacobus Baumann* at the time of seizure, that the ship was laden at *Leboue* in *France* in the month of November last, with a cargo consisting of 815 hogsheads of wine, to be delivered at *Hamburg*; that upon the morning of the 7th of *January* last, the said ship was boarded by an officer and several men belonging to the *Apollo* frigate, then stranded and in distress, who told him that he must go down to the assistance of the frigate.”

It does not appear from this affidavit that the man made any objection, or was backward in giving this assistance; nothing like it: on the contrary, he went down unsuspectingly, and took the whole of the crew, to the number of 170 or 180 men on board. After they came on board, it seems, they started between 2 and 300 hogsheads of wine into the sea; such an event might take place, under the particular circumstances of their situation, without much blame being imputed to them. The master farther states, “ that the captors likewise threw overboard sundry goods stowed

A claim of capture by persons coming on board in distress rejected; freight, expences, and demurrage given to the ship.

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in the cabin, and divers articles belonging to the ship; and on his remonstrating against such conduct, he was repeatedly assured by the officers of the frigate that full satisfaction would be made to him by the *British* government." It does not appear that he objected to the removal of the wine; but he did remonstrate against the goods being removed out of the cabin, and he seems to have acquiesced under the assurance which he received from the officers, that compensation should be made him. I should not impute much blame to the captors for this act, nor to the master for his remonstrance; the captors might think it necessary to have the goods removed, but the master might not feel the necessity, or he might make this sort of remonstrance for the purpose of receiving those assurances which were afterwards given to him. It was not unnatural that such a man should feel some uneasiness at the loss of his cabin-stores; and till he was assured that compensation was to be made to him, it was fit that he should express it. The ship arrived at *Yarmouth* upon the 10th of *January*; and it appears, that during the passage from the frigate to *Yarmouth* she was navigated by the master himself and his own crew, except that the pilot belonging to the frigate conducted her through the banks of *Yarmouth*. On the 10th and 11th of *January* the crew of the frigate left the ship and went, some on shore, and others on board his majesty's ships lying at *Yarmouth*. He states, that the papers were demanded from him, and he was directed to go to a Mr. *Stewart* of that place.

Now supposing this account to be true, I cannot but think that this was a service of the highest importance;

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portance; in truth, not much short of a high salvage service: an assistance was given, which, whether voluntary or not, was the actual means of restoring 170 or 180 officers and men to this country. The parties who conferred this benefit are surely entitled to be liberally considered by those who received it.— Who are the parties who conferred it? Clearly the master, because he was immediately concerned in the transaction; and I think, likewise, the owner, whose vessel was the instrument of preservation. With respect to the owners of the cargo, I cannot see what special claim they would have; their property is not at all concerned in the preservation of the crew, so taken up; and if it turns out to be enemy's property, there is no reason why that may not be condemned—I therefore think this suit has been not improperly instituted: but if the ship had really belonged to an enemy, in my opinion, the character of enemy itself must have been blotted out and obliterated by such a service as this. If I was compelled to condemn this ship, it would be a most reluctant condemnation indeed. I hope and trust that if the circumstances are true, as stated by the master, a condemnation of the vessel would be the very last thing to present itself to the expectation of the asserted captors.

This being the case, then, upon the statement of the master, it remains only to inquire into the fact, whether it is true or not; for if this account is fictitious, then all these encomiums which I have passed upon it are entirely thrown away. Now I observe there are no affidavits brought in on the part of the captors to shew to me that this is not a fair repre-

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representation. They might have produced them; but I do not understand that there has been any application made to the court for leave to exhibit affidavits on their part, in order to contradict what the master has deposed. It stands therefore uncontradicted by the captors; and till this moment no attempt has been made to impeach the truth of the master's representation. If it is contradicted at all, it is said to be contradicted by his own deposition, for that he has deposed to a fact of capture on the high seas, whilst all that he has said beyond that is a mere fable, as he was taken in the ordinary course of prize.

But I cannot accede to this representation. It is true, that upon the third interrogatory he says, in the usual words, "that he was taken and seized upon the high seas, on suspicion of having *French* property on board, and that he was taken by the *Apollo* frigate." But this I understand to be little more than the formal answer to the interrogatory, as usually taken by the examiner; describing in a sort of general way the ship whose crew took possession of him, and the time when that possession was taken; but not excluding these particular circumstances, which stand uncontradicted on his affidavit. There it appears that the true reason of their coming on board was the immediate preservation of their lives, and that they never thought of demanding his papers in quality of captors till they had got safe into *Yarmouth*. Nobody, at this time, ventures to deny that the situation of the *Apollo* was what he describes it; and if so, it is not to be taken literally that a stranded ship went a capturing; and I will add, that it is not a very probable thing that the crew

crew of such a ship should apply to any other vessel, with any other original purpose than to obtain assistance. The assistance was given. Upon the 25th interrogatory he expressly mentions, "that the wine and other goods were thrown overboard about a mile from the *Haak* sands, for the purpose of enabling them to take on board the crew of his majesty's frigate the *Apollo*, which was then upon a sand." I can entertain no doubt of this account: The mere fact of 170 or 180 men coming on board, and remaining, is a proof that they came for another purpose than that of making prize of this merchantman.

An offer has since been made by the captors to release this ship; but the offer was clogged with a reservation of freight and expences, and the poor man's private adventure, and therefore could not be accepted. It turns out that the agent for the captors afterwards brought in papers relating to the private adventure, which had been delivered up some time before by the master.—Why were these papers not brought in immediately by the agent? They were very erroneously kept back. Agents must understand that they have no right to keep back papers in their own private possession. The inconvenience of failing in this duty is manifested in the present case; for as soon as ever these papers were brought in, a restitution of the private adventure was immediately offered.

Another fact of a similar kind requires some observation from me: The master, upon his examination, brought in a paper which the interpreter refused to accept, saying it was of no consequence: What right had the interpreter to say that? What were the commissioners and actuary about, when they permitted it to be said?

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CASES DETERMINED IN THE

The
JONAS
JACOBUS
BAUMANN.

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It happens that the paper is of no special importance; but every ship's paper is of importance; and the commissioners are bound to receive it.

Upon the whole, I think there does appear great merit upon the part of this master, with respect to the preservation of so many lives of his majesty's officers and crew; and I am of opinion that the Court is bound to act as liberally as it can. I shall restore the ship, and I shall give the freight and expences, and private adventure, and a reasonable demurrage during the time the vessel has been detained; and I desire that these may all be estimated by the registrar and merchants in the most favourable manner.

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THE ODIN, HALS Master.

THIS was a case of a ship ostensibly transferred from a British subject to a Dane, and taken trading with the enemy.

JUDGMENT.

Sir *W. Scott*—This is a case of very considerable property; the ship and cargo, both of which are involved, being described to be of the value of 150,000*l.* Being of this value, it is of course a case of proportionable importance, and I feel the caution with which a judicial determination upon interests of such an extent ought to be framed and delivered. At the same time it is unnecessary to observe, that the *quantum* of the property can have no influence upon the legal merits of the

the questions which I have to examine; the same principles apply to a case of 150*l.* (all other circumstances being equal,) which must be applied to this case of 150,000*l.*; and the same general duty lies upon the Court to proceed with all the tenderness which is due to property, however small, and with all the firmness which it is bound to exercise, be the property ever so large.

The claim given is for the ship and cargo, as the property of Mr. *Jacob Krefling*, described to be a *Norwegian* by birth, resident and carrying on his business at *Fredericksnagore*, a *Danish* establishment near *Calcutta*, in which he is second in council. It appears that the ship went with a cargo from the river *Hugbley* to *Batavia*; part of that cargo she disposed of there, and took another cargo destined to *Copenhagen*; and in the prosecution of her voyage was seized and taken by a *British* ship of war. And if this had been the whole of the case, the consequence must have been an immediate restitution; because this Court has not taken upon itself to lay down, that a *Danish* merchant at *Fredericksnagore*, a *Danish* settlement, may not send a cargo of his own, in his own ship, to *Batavia*, there dispose of that cargo and purchase another, and bring it to his own country in *Europe*. But a fact appears in the case, a fundamental fact, which gives rise to the whole of the present inquiry, namely, that this ship had been, a very short time before this voyage, the property of Messrs. *Lambert* and *Ross*, *British* subjects, residing at *Calcutta*. This fact leads to the question, whether this ship had been actually and *bond fide* transferred from them to this *Danish* merchant? For if not; if she continued

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tinued the property of these *British* merchants, going on their commercial errands to *Batavia*, then a port of the public enemies of his majesty, she is going illegally, and illegally, so as to subject her to confiscation; there being no maxim better or more firmly established, in the maritime law of this country, than this, that no subject of the king can trade directly with the public enemy, but under a licence authorising him so to do; and that if he does presume to trade otherwise, his property, so employed, is liable to confiscation.—If this should turn out to be the case respecting the ship, it will dispose of all *British* interests in her. The cargo, it is to be observed, is claimed for the same person, and in the same claim.—If the claim is deemed fraudulent, as it respects the property of the ship, it will, I think, be entitled to little regard as it respects the property of the cargo *claimed for the same proprietor, and appearing evidently to be concerned in one and the same original adventure.* I am not aware of the obligation that lies upon the Court, in the case of such a claim, to separate its sound from its diseased parts, for the benefit of a claimant detected in the falsehood of a considerable portion of his claim. He has no right to insist that a discrimination shall be made in the property, which, if any part be his own, he has fraudulently and with corrupt views mixed up with the property of others. But in this particular case, it does not rest upon that general principle, because much of the evidence (at least arising from general circumstances,) which applies to the property of the ship, applies with equal force to that of the cargo.

It is not to be denied that the ship had been very recently the property of these *British* merchants, navigated

gated by *John Elmore*; but here is a bill of sale regularly executed under their hands, by which she is transferred to Mr. *Krefting*; and the benefit of the general presumption has been claimed for this transfer, that every act must be presumed a *bond fide* and a real act—to which may be added, the other general presumption, that the acts of men must be taken *prima facie* to be innocent; whereas if this transfer is fictitious, here is a criminal transaction of a direct trading with the enemy. Other more particular presumptions have been called in aid—It was said, that it was highly improbable that *British* merchants should send their property of immense value to an enemy's port, where it would run the hazard of confiscation. To estimate the weight of that presumption, I must recollect what was the situation of *Batavia*; a settlement loaded with valuable produce, which they had no means of exporting, nor any sufficient opportunities of sale: In this state of things, they would be likely enough to favour the access of every customer, without inquiring very minutely into his national character; if a man came there with good bills to hand off these valuable products, he might wear a very thin veil without much hazard of their peeping under to discover the real country to which his capital belonged; a slight covering would suffice, and no danger of a severe curiosity.—It is said again, that there could be no inducement—but to that the state of the settlement I have described is a complete answer, for in such a state there must be the temptation of most extraordinary good bargains. It is hardly possible not to notice, upon the subject of presumptions, something of a counter-presumption, that

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that if *British* subjects meant to adventure in a trade of that nature, *Fredericksnagore* is a convenient neighbour to call in aid of such projects.—It is near *Calcutta*; and the opportunity of communication open and constant.

Not only the bill of sale, but there are other papers which have a regular appearance; so that if the Court pronounces against the claim, it must pronounce that these papers, several in number, are mere fabrications utterly void of truth.—The first observation made on the part of the captors is, that upon any supposition the papers would be regular; and it is true; for the very intention of the fraud is (if it be a fraud) to deceive by the regularity of the papers: it is the necessary apparatus and machinery of such a case—and therefore it is by no means enough to say, “Our papers are all in order.” What, it is asked, do you hold papers for nothing? Are we to have a new law of nations, in which it is to be held that regular documents are of no avail? Certainly not—such papers, duly verified and supported, are strong *prima facie* evidence in all cases; and, if unopposed, are conclusive evidence: but if there are circumstances and facts appearing in the case, leading justly to the conclusion, that those papers, though formal in themselves, and though formally supported by oath, are nevertheless false, it would be ridiculous to say that the Court is bound by them. It is a wild conceit, that any court of justice is bound by mere swearing: it is the swearing credibly that is to conclude its judgement. Unquestionably, a Court of Admiralty will proceed with all requisite caution in determining against regular papers, regularly supported; but if the papers say one thing, and the

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the facts of the case another, the Court must exercise a sober judgment, and determine according to the common rules of evidence to which the preponderance is due.

The first question that occurs upon regular papers is, Whether they are duly supported by the oath of the master? For he is the person who is expected to verify the transactions. But unfortunately, in the present case, here is a preliminary question to be settled, *viz.* Who is the master? For there are two persons to whom that character is attributed—*Hals*, and *Elmore* the person who had been master before the transfer: *Hals* says he himself was master; so says the mate; and so says *Elmore*—but one witness, *Roma*, says no, that *Elmore* was the real master, and *Hals* merely colourable master, without any real authority or concern whatever respecting either the ship or the cargo. It is a material question, touching the credit of these witnesses, and by so doing affecting the merits of the case, in whom the character of master really resides? *Roma* has been described by the counsel for the claimants themselves, as ignorant, but not corrupt; and he is certainly ignorant on points which he had not the means of knowing; but upon those points, it is observed, he speaks with modesty and reserve, and in an avowed style of mere supposition and belief. Is there any instance in which he has taken upon himself to speak confidently, where he had not the means of knowing certainly? I find none. With respect to the witnesses who contradict him, he has a right to have applied in his behalf, that test, to which all witnesses produced in all courts of justice are subject, *viz.* that any one detected falsehood in their deposi-

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tion overthrows the whole of their credit. I am well aware that this rule may be too rigorously pressed to the disadvantage of a very fair witness. On a public examination a witness may, by sudden and ill understood questions, be made to commit contradictions, which are to be held up as fatal to his general testimony. But where a witness is examined deliberately, and in private, upon interrogatories prepared, and has the opportunity of weighing his answers before he finally signs them, they being read over to him, it must at least be admitted, that whatever other disadvantage such a mode of judicial inquiry may be exposed to, it can never be seriously urged that a witness has been entrapped by surprise and through inadvertence, and has been made to say that in hurry and confusion, and mere weakness of nerves and apprehension, which, on recollection and deliberation, and the free use of his understanding, he has a right to unsay; and therefore, in courts proceeding in this course of examination, the rule of *falsus in uno falsus in omnibus* is a rule of unexceptionable justice. Now, to apply this test, Mr. Hals (to whose prejudice I am unwilling to strain any thing) says, in positive terms, "that there were seven passengers on board this vessel —there names were *John Elmore*, *John Ewing*, two children of a Mr. *Ede* of *Bengal*, a child of a Capt. *Dawes*, a black servant belonging to the same children, and a black servant belonging to the second mate; that the said *John Elmore* is an *Irishman*, formerly *master of the ship*, and at times assisted the deponent in the navigation of her." According to this account, *Elmore* was a mere passenger, and nothing else, occasionally giving a voluntary assistance, and nothing more,

more, as any other mere passenger might do. The mate, in like manner, or rather with more reserve still, says, that there were such and such passengers—and amongst them Mr. *Elmore*. Now it does happen that Mr. *Elmore* himself is examined—and first, What does he say with respect to the passengers? He says there were four passengers on board—Mr. *Ewing*, an *American*, and three children, whose names he mentions.—According, then, to this account, there were only four passengers, of whom he does not at all number himself as one. He is asked in another interrogatory, “In what capacity he belonged to the ship?” he answers, “that he was sea-pilot or navigator, and that he was engaged to go in that character upon this voyage:” he has not thought it necessary to mention upon what terms. But he says this official character did belong to him; he was an officer on board the ship, and so appointed by Mr. *Krefting*. Now, if this be the case, I ask, Is it a true representation or a false one which *Hals* has knowingly given of this matter? This question must be determined by what every man must understand *Hals* meant to convey respecting the situation and character of *Elmore*. If he meant to convey this impression, that *Elmore* was a passenger, and a passenger only, who occasionally lent a hand from mere inclination, is not that a gross falsification on the part of *Hals*, who being the master of the vessel could by no possibility be ignorant that *Elmore* was on board this vessel as a hired officer, on a contract with their common owner. Taking it in this view, I cannot but think that it would a most unnatural strain of charity, such as must do violence to any man’s understanding,

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or his sincerity, not to pronounce that *Hals* has most grossly prevaricated in his representation of this matter. And therefore, whatever his general character may be, about which loud outcries have been made, that must be extracted from other materials to be found elsewhere; but from what is found here, I am under the necessity of holding him a witness utterly unworthy of all credit in this cause—and I may venture to strike his mate out of the list of witnesses for the same reason.

The matter of fact then stands, these two witnesses being dismissed, between *Elmore* on the one side, and *Roma* on the other; *Elmore* describing himself as sea-pilot, *Roma* describing him as real captain. By sea-pilot, a term not very familiar to landsmen, I presume is meant the person who has the care of the navigation at sea, but has nothing to do with the concerns of the vessel in port. Accordingly, it is represented that *Elmore*'s authority ceased entirely on coming into port—*Hals* appears in command—he is presented by the owner of the ship in that character to every person who has dealings with the ship or cargo, and *Elmore* sinks into the mere passenger, uninterested and unauthorised respecting either. But how stand the facts? Certain it is that Mr. *Elmore* is entered upon the muster-roll and the log-book as a passenger—a false fact *ab initio*. In order to account for this, an explanation is suggested, that this was done to prevent his being known as an *English* officer of this ship at *Batavia*, an enemy's settlement, where he might have been personally treated as an *Englishman*, and with some danger to the ship herself, on account of his official connection with her. If that had been

been the only purpose of this disguise, it would have dropped off when he left the enemy's country and the danger ceased. How comes it about, that, even so late down as on the present examinations, long after all fear of the *Dutch* was out of the question, *Hals* and the mate still hold out this man as a mere passenger. The explanation, therefore, is but a half covering for the fact. As to subsequent transactions, it appears that *Elmore* confined the chief mate by an act of his authority, during the passage—that he gave the orders for stowing the cargo, and that during the voyage from *Calcutta* to *Batavia* he sold boxes of opium, a commodity of which a very large value will lie within a very small compass. *Roma* says that he went down into the hatchway to sling them up, and on asking *Elmore* if it made any odds as to number or marks, he said no, and directed him to take the first that came to hand.—These are acts of power rather beyond the functions of a sea-pilot.—At *Batavia* how is he employed? An application is there made by a person for a passage to *Europe*—this application is not made to *Hals*, but it is made to *Elmore*, under the denomination of Captain *Elmore*—the pretence set up is, that he being an *Englishman*, it was natural the application should be made in this way; that is an explanation that has but half a colouring in this case, for he lets the cabin to this person; he describes the cabin as, *my cabin*, and the price as, *my price*. The same observation applies to the act of confining the chief-mate; that authority was exercised by *Elmore*: but there is a sort of formal paper exhibited, in order to shew that that might be done by order of *Hals*. There is also impress-money, which he pays in his

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own name.—Why it is said, in answer to all this, that this was an act of necessity; that he was obliged to transact this business, because he himself was unable to go on shore, and dared not to set his foot in a hostile port. Now I think the letter which is exhibited here, written by this person, does give the most effectual contradiction to such representation. It is a letter addressed to Messrs. *Lambers* and Co., in which he says, “ I assure you I have not had a foot on shore since Mr. *Ogilvie* left the ship at *Calcutta*. I was not allowed to take an *English* assistant, and a *Dane* could not be procured for any money; 200 rix dollars were offered. I left *Bengal* with two assistant *Danes*; the one was constantly inebriated; the other, the second, so ignorant, he did not know the right end of a hand-spike.”

This is not the style of a man having nothing to do but with the sea-navigation of this vessel. It is said, that this is a mere effusion of vanity; a vain glorious air of representing himself as a commander, where he was not.—Not very likely, I think: Mr. *Elmore* is a man advanced in years, much beyond the vanity of youth. He had been master of this vessel; and therefore was not very likely to turn giddy with such an elevation. He goes on to state, “ and I am certain, had I left the ship for one day, that we should not have a man on board the next:”—that passage conveys to my mind a decisive impression, that this man remained on board the ship, not because he was afraid of going on shore, or had any personal apprehension from the *Dutch*, but because he had the authority of that ship, and certainly wrote as the master—then, if that is the case, what becomes of the

the plea set up?—I say a more direct misrepresentation could not be furnished than is affected to be given of this transaction—to be sure, there were twenty reasons why this man should be held back in this transaction; for certainly, whatever the truth of the transaction might be, it was to appear a matter perfectly fair. It must be a part of the scheme, *a priori*, that the outward appearance was to be *Danish*—totally *un-British*, if I may be allowed so to express myself—a *British* master would have been an inconvenient personage—still more the former *British* master.—If a *Dane* had *bona fide* purchased, the former *English* master is the very last man he would have chosen to have left on board, and especially with any share of command in her. A *Dane* must have felt, that it was for his interest in the river *Hugbly*, as well as at *Batavia*, to have not a shade of *British* complexion remaining upon his property.

There is much collateral evidence arising from other circumstances, of which *Hals*'s rate and state of expences is one.—*Krefting*, the supposed owner, writes him a letter, in which it appears, that he was to be allowed for his expences at *Copenhagen*, sixteen dollars a month, (about twenty pence a day,) and he is not to spend more. Now, without supposing that the master of a *Danish East Indiaman* is accustomed to the same style of establishment which is known to exist in *British* vessels of the same description, and making all reasonable allowance for the difference of money at *London* and at *Copenhagen*, and for the different habits of luxury which may prevail in those places, I cannot but think it an extraordinary thing, that the master and manager of such a valuable *East India*

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India ship and cargo as this (stated to be 150,000*l.*) should be restricted by his owner to so severe an œconomy as twenty pence a day on his arrival in the capital of his own country in *Europe*. It is impossible that this can be the allowance made to the real master of the vessel.—As to transactions of business at *Batavia*, the balance, in point of agency, is without all comparison on the side of *Elmore*—he does every thing that is done, and appears to have the whole of the confidence.—Great reliance was placed upon the objection, that *Elmore* could not be the captain, because he was not to complete the voyage; he was to leave the ship in *England*, and not to go on to *Copenhagen*. I can't think that much attention is due to that. Precautions were taken for forwarding this ship on her arrival in *Europe*, from *England* to *Copenhagen*, and for managing her concerns there—the voyage was substantially completed on her arrival in *Europe*; and to say nothing of the plea of ill-health, which made it desirable to *Elmore* to quit the ship in *England*, there are other reasons, obvious enough, why it should be deemed prudent for an *English* captain of a foreign *East Indiaman* to retire from the ship as soon as possible after she reached *England*, coming from the ports of the enemy.

Upon the whole, I am satisfied, judging as carefully as I can, that *Elmore* was the real master of this vessel. That being determined, how does it affect the truth of the transaction of the sale? He was master to the time of the sale: *Hals* proves that he delivered him possession of her—*Elmore* gives a different representation; for he says that *Krefting* delivered possession; and though the counsel have accounted for this,

this, by saying that *Krefting* delivered possession by the agency of *Elmore*, I cannot but think that the explanation would have come rather in a more satisfactory form, if it had been furnished by *Elmore* himself in his deposition. It is clear, then, that *Elmore* was the master up to the time of the transfer.—It is likewise clear that he was master afterwards, and upon terms of particular intimacy with the owner, Mr. *Lambert*; for there is a letter produced, in which he gives a confidential account of his private concerns, addressed to Mr. *Lambert*, under the title of, “ My dear friend.” Now it appears to me, that a master, standing upon this footing, could not but have been apprized of the material circumstances of the transfer of this *East India* vessel, of which he was master before, and continued so afterwards. Let us then see what he says upon the purchase. Being asked on the 9th interrogatory, he says, “ That *Jacob Krefting* was the owner of the ship at the time of seizure: his cause of knowledge is, that he gave directions concerning the ship, and engaged the deponent to go as pilot on the voyage under Captain *Hals*, and that *Krefting* was always received, when on board, by *Hals*, as the owner, and saluted as such.” That is all he knows about it. He is asked about the bill of sale; he says, “ It was made by the former owners to *Jacob Krefting*, but he can give no further account of it, having never seen it.” On the concluding interrogatory he says, “ That the ship was built for the house of *Lambert* and *Ross* and Co. of *Calcutta*, and they sold her to *Krefting* in December last at *Calcutta*, as he believes.” He knows nothing then of the bill of sale, nor of the conditions of sale, nor anything about it, except what he

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he learns in this distant way from observation and general inquiry. Now I cannot but think, that if such sale had taken place, it was impossible but that he must have had a complete knowledge of it. He therefore either dissembles his knowledge of a transaction which he must have known, or no such transaction passed. To make it more incredible, it appears that this person, in one of his letters to *Lambert*, says, " You know *Krefting* has appointed me sea-pilot;" referring to the course of events that had taken place, as matters of mutual communication and knowledge. Looking to all these circumstances, I am bound to say, that *Elmore* is discredited, and that the discredit of such a person, attention being had to all his relations towards this ship, does in a most material degree involve the discredit of the transfer itself.

Upon the papers, then, it is stating this case charitably to say, that it is a case of further proof, the papers being in no degree supported. As to depositions, *Hals* and the mate I have dismissed, *Elmore* professes entire ignorance; *Roma* says he heard it reported that the ship belonged to *Lambert* and *Ross*; it may be said, that this leaves it at large. It becomes then necessary to notice other papers of a less formal nature, but which are of no small importance in the decision of this cause, I mean three letters to Mr. *Lambert*.—It is admitted by the counsel for the claimants that they are not without their difficulties; at the same time it is to be remembered that difficulties may appear in a very fair transaction. But if the transaction is fair, a clear and certain explanation is to be expected; and the rather because the parties are

are on the spot who can supply it. It is the fate of this Court frequently to have cases submitted to it loaded with difficulties which it is very laborious to remove; because the parties, from whom alone explanation could be obtained, are living in another quarter of the globe. It sometimes happens (it did so, very much to the satisfaction of the Court, in the *American case of the Providence*,) that the party is in Court, and does, with a promptness that beats down all suspicion, give solutions as fast as objections are proposed. In the present case, Mr. *Lambert*, the party, is in *London*; for though this is not expressly admitted, yet the whole turn of the argument supposes, that the Mr. *Lambert* now in *London*, and the Mr. *Lambert* who was then in *India*, and was returning to *Europe*, is one and the same person. He is, therefore, at hand to furnish all necessary explanations to the counsel, and he was bound in justice to give all the assistance which must unavoidably have been required. The Court, therefore, had a right to expect that the difficulties in these letters, which are addressed to himself, would have received explanations—not such as can be traced no further than the mere ingenuity of counsel, of a nature merely conjectural at best; but explanations arising from an intimate knowledge of the transactions, and consequently having all those characters of certainty, and singleness, and clearness, which prove at once the truth of the facts and the truth of the explanations.

The letters exhibited are three in number—No. 7. is a letter, dated *Batavia*, *March 3, 1798*.—There can be no doubt, upon the comparison of hands, that this

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this is a letter from Mr. *Elmore*, and it is subscribed with his initials, *J. E.*

“ Dear sir—The *Odin* arrived here the first ult. Capt. *Halse* is taking in a cargo on account of Mr. *Krefting*, as Mr. *De Coning*’s freight would not answer his purpose. He does not expect to leave this place until the first of *May*, which will make it *December* before I can have the pleasure of seeing you in *London*.

J. E.”

Now the explanation given of this letter is, that it might be for no other purpose than to inform Mr. *Lambert*, the friend of the writer, that he should be in *London* in *December* and not before. If that be true, what occasion is there for the writer to enter into the history of the *Odin* and her cargo? Why inform Mr. *Lambert*, who was unconcerned in the ship and her cargo, that Capt. *Hals* is taking in a cargo on account of Mr. *Krefting*, as *De Koning*’s freight would not answer his purposes. That was perfectly immaterial as to the matter of delay; because the taking in a cargo for one person would just take up as much time as taking it for another. But if Mr. *Lambert* was really represented by Mr. *Krefting*, the nominal party, it was most important intelligence. It informed him; in a very few words, that there was a cargo coming home on his own account; that of the two modes of proceeding proposed, it had been found advisable to adopt this, and that he might insure, and take other measures accordingly. As to the suggestion, that all this was for the mere private amusement of Mr. *Lambert*’s curiosity, about what was passing at *Batavia*, (as a man interested in the transactions of the *East*.) I must

must observe, that the mere insignificant information about this ship and her cargo is a very poor selection of topics for such a purpose, and that the letter is addressed in the absence of Mr. *Lambert* to Messrs. *Prinsep* and Co. who could certainly feel no curiosity about any such matters.

The next letter is taken from the *Nancy*: The particulars contained are numerous; and it has been argued as if every one of those particulars must be taken for true. By no means—if persons are driven to the necessity of sending information by other ships concerning matters which are not to be fully avowed, it is not to be supposed that the truth, and the whole truth, will be disclosed. Such letters, the parties very well know, are themselves liable to be intercepted; they will therefore be framed with a view to that accident. They will contain as much information as may be necessary, and no more; and they will be mixed up with other matter, giving the business an inoffensive complexion. Such letters are half natural and half artificial: all that makes for the writers is to be suspected, and all that makes against them may be literally and safely applied.

The letter states, “ The *Odin* will certainly sail from this place the first of next month, loaded entirely on account of Mr. *Krefsting*, being the return of 410 chests of opium, and 280 bales of piece goods; the former sold for 300 rix dollars *per chest*, the latter 30 *per cent.* on the invoice. The returns are a *specified quantity* of sugar and coffee, which entirely fills the hold.” Now, although he had already informed him of the arrival of the *Odin*, yet he enters into all the particulars of the cargo, and the manage-

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management of it, in a most minute manner—and he concludes, “be so good as to order me a pilot to relieve me at *Dover*, to carry the ship to *Copenhagen*,” &c.

Now, why all these minute particulars respecting this ship and cargo to Mr. *Lambert*, if he was totally unconcerned with the ship and cargo? Why is he to provide pilots? If Mr. *Krefsting* had really purchased this vessel, is it not to be presumed that he had taken all due care to make arrangements of that sort, and had not left it to the chance of Mr. *Elmore*, the sea-pilot writing a letter, upon the further chance of Mr. *Lambert*'s having arrived in *Europe*.—It has been observed, by way of explanation, of Mr. *Lambert*'s being so minutely informed of the lading of this vessel, that he might have an interest in the insurance of this cargo made at *Calcutta*. That could not possibly be, because it was perfectly uncertain whose the cargo was to be, *De Koning*'s or *Krefsting*'s—and likewise, because it is perfectly clear, that *Elmore*, the writer of that letter, asserts, in his deposition, that he knew of no insurance whatever.—The third letter is that already referred to, in which Mr. *Elmore* writes, “that he had not set a foot on shore,” &c.

Thus then stands the case upon these letters; and they certainly speak a language inconsistent with the formal documents. It is impossible to account for these letters on any supposition that Mr. *Lambert* was totally uninterested in this ship and her cargo. The test proposed is a perfectly fair one; shew authentic documents that are inconsistent with the transaction as a fair transaction, and it is overthrown. Twenty fair papers may appear, be the transaction what it may; but it is impossible that a contradictory document

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document can appear, coming from the parties themselves, and yet the transaction be true. One document of that kind reduces the matter *ad absurdum* & *impossibile*. The balance stands thus: All those other papers may be fair, and yet the transaction be false—but this paper cannot, by any possibility, be here, if the transaction be other than false. Let us briefly consider the *res gesta*—Mr. *Lambert* and *Ro/s* are the asserted sellers of this valuable ship; the ship is going to *Batavia* to take in a valuable cargo from the enemy's settlement and carry it to *Europe*. *Elmore*, their former master, is the person employed to carry this project into effect. It was rather to be expected that Messrs. *Lambert* and *Ro/s* would discountenance such an undertaking, as well on account of its interference with *British* interest in *India*, as on account of its being a direct unauthorised communication with the public enemy, for the purpose of relieving them out of their commercial distresses. The Court is sorry to observe, that a number of *British* subjects, in the character of officers of this ship, are associated in this undertaking, not only against the rights of the *British East India* company, but against their allegiance. Are they not aware, that it is something very like misconduct to go to the enemy, without any permission, for a purpose of this nature? It is hardly to be conceived that Mr. *Lambert* and Mr. *Ro/s*, without some very considerable interest in such a transaction, would give it the aid which it appears they did. Here is a foreign *East India* undertaking, disengaged in a very high degree by the laws of this country, so far as *British* subjects can be concerned; here is a public direct trading with the enemy,

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enemy, for the purpose of relieving the valuable products of his eastern settlement from the embargo under which the naval successes of this country had placed them. How far such an adventure has a right to use the convenience of *British* ports in *Europe*, and of *British* agency in such ports, may be matter for some consideration. But at any rate, the degree of communication, and correspondence, and agency, in which Mr. *Lambert* is connected with the transaction, does very much favour the supposition that all his interests in this vessel, of which he was recently the undoubted proprietor, were not completely divested. So much for the letters.—Who is the purchaser? a Mr. *Krefting*: Mr. *Krefting* is described to be second in council at *Fredericksnagore*. I presume I do no injustice to that settlement, when I say, that our idea of a second in council there, is not to be formed upon exactly the same scale with that of a second in council at *Calcutta*. In other papers he is described, I observe, director of the auctions and a notary publick. He appears to have gone to the East in 1787, and to have resided about two years of the intermediate time in *Europe*, part of which was spent in *England*. I am well aware of the rapid manner in which fortunes are accumulated in that quarter of the globe, and, therefore, am not prepared to deny that Mr. *Krefting* might have accumulated a fortune of 150,000*l.* which is required to cover the present adventure. But there is a letter exhibited, which makes a strong impression upon me; it is written by Mr. *Krefting*, the secqd in council, to *Hals* the master, the person who is restricted, in his expences in *Europe*, to 1*s.* 8*d.* a day, and, therefore, one would expect

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to be written with all the distance which such a disparity of situation begets and requires; accordingly the formal papers are all composed in a style corresponding to their difference of fortune and condition. But this is a letter written in a style of the utmost familiarity—in a tone which the counsel for the claimants have represented as favouring of idle jocularity: “ My dear *Hals*,—Whether it will please or displease you, I cannot tell: upon my soul I cannot send you the beef you desire, for there is not time for it; and I am already 72 rupees in debt to *Dawes*, which I cannot immediately pay: and now to go and raise a new account, it will not do: upon my soul it is not for want of inclination.” This is said to be jocular.—I have but a dull fancy in matters of that sort, and, therefore, cannot pretend to limit the effusions of a sportive fancy; but to me it appears to be a very serious plea *in formâ pauperis*, in which it is represented, that the writer, who is the owner of an adventure of 150,000*l.* value, is disabled from sending a small supply of beef, on account of his having already run up a score with his butcher to the amount of seven or eight pounds. Make what allowance you please for the difference which may happen to exist between two *East India* companies, it is impossible to avoid two conclusions on reading this letter; that the person to whom it is addressed could not be the real master of a great *East India* vessel, and that the writer could not be the real owner of that vessel, together with her cargo, amounting to 150,000*l.* I say nothing further of the gross improbability, that if *Krefting* had really purchased this adventure, he would have been so imprudent as to endanger interests of

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such magnitude, by connecting with the conduct and management so many *British* persons, and particularly the *British* merchants from whom they are affected to be purchased.

There is only one person more to whom I shall advert, that is Mr. *Elmore*, the former *British* master—continued in his employment, and continued under a mask—the fact attempted to be dissembled, but clearly proved;—this same Captain corresponding on the concerns of the adventure, and with the former *British* proprietors: can any thing look more like a mere shifting of name, and nothing else? a mere nominal transfer; all substantial interests remaining the same.

This then is the general view (omitting many particular remarks made by the counsel) which I am disposed to take of this case, as well respecting the cargo as the ship; most of the observations affecting the cargo as well as the ship, and indeed with superior force, on account of its superior value. What is the Court to do upon this view? Further proof has been rather rejected on the part of the claimants, on account of the distance of the parties from whom it could be obtained; although I can't help thinking that there are persons nearer at hand who could give a pretty full account of the matter. [*Laurence*—We did not mean to be so understood.] Then I will take it the other way—Farther proof is now asked, but it is not much pressed—I have stated the general impression which the case has made upon my mind; and it is the perpetual comfort and consolation of the chair which I fill, that any erroneous impression of mine will be corrected by a more enlightened tribunal. It is my duty,

duty, however, to determine them according to my own impression; and following that guide, I pronounce my judgement to be, that Mr. *Krefting* is not the real proprietor of this ship and cargo, and I therefore reject the claim, and condemn the property as lawful prize.

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THE TWO FRIENDS, M'DOUGAL Master.

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THIS was a case of salvage on recapture of an *American* ship by the crew; part of whom being *British* seamen, and praying to be rewarded, the cause now came on to be heard *on protest* against the jurisdiction of the Court over an *American* ship.

In support of the Protest, the King's Advocate and Sewell—However much persons may differ in opinion respecting the policy of encouraging rescues of this sort to be made from the enemy by the crew of a captured vessel, it certainly is not from the owners that any objections are to be expected; it is not for them to deny that the parties who recover property for them ought to be liberally rewarded. There is accordingly no disposition in the owners in this case to withhold a very liberal recompence from any whose services are acknowledged. But it is by no means admitted that the services of *Miller* and the other *British* seamen were such as they represent them; and it is conceived that this is not the proper jurisdiction before which *American* owners are to be called, to contest the demands of one or two of

The Court of Admiralty will exercise a jurisdiction over a foreign ship rescued from the enemy, if there is any *British* subject concerned in the rescue who prays to be rewarded here.

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their crew. It is hoped, therefore, that the liberality of their intention will not be questioned on account of the resistance which they think themselves bound to make to those claims.

As a recapture from the enemy, this case is a case of prize; and it is not to be argued, that this country can exercise a prize jurisdiction, any more than any other jurisdiction, over foreigners. In respect to other matters, there have been many cases in which the Court has always cautiously declined such an interference. There have been instances of suits for sailors' wages between foreigners, which the Court has always rejected; and it would be a ground of great jealousy if it were now to depart from that practice in respect to *America*, and to assert a jurisdiction over *American* subjects, especially in matters of prize. That there was an *Englishman* concerned in this affair can confer no jurisdiction; for such a distinction would be attended with endless confusion. Suppose an instance in which, *Spain* being a neutral, a *Spanish* sailor, being one of the crew of an *English* ship recovered from the enemy, should apply to *Spanish* courts of justice for his recompence; by the *Spanish* law, after 24 hours possession, the whole would be prize to the recaptors, while we should allot only a certain proportion: how could such a difference be reconciled! or how can it be supposed that the *English* owners would submit to such a determination!

These are the objections on the supposition that *Miller* was a passenger, as he represents himself: but the fact is, that he was inrolled as one of the crew, and signed the ship's articles in the rank and situation of carpenter. In that case his national character

racter must be taken from the service in which he is employed. But there is an affidavit produced, stating his signing to have been by mistake, and explaining the reasons why he assumed the character of carpenter as a disguise; and there is a note produced also to shew that he actually paid for his passage; and it is argued that he is to be considered as a passenger. At most this is but parol averment against his own act, and, therefore, not much to be regarded. It is, besides, not clear that the note was not given for collusive purposes. It is submitted, under these circumstances, that as carpenter he must share in a subordinate capacity, and not to the extent of his present claims; and that even that share cannot be allotted to him by this Court.

In respect to the cargo of this vessel, the warrant is directed against the whole; but part had been before landed and delivered to the consignees, and therefore the process of the Court of Admiralty cannot reach it, as being *in rem* only; and not extending to goods on shore; as it was determined in the case of the *Ooster Eems*, in the last war; the parties have therefore lost their remedy against that part, and must be referred to the courts of *America*, where they may have full redress against the owners in another way.—The Court asking whether any offer had been made to the other part of the crew,—it was said, that the underwriters had offered the master a reward of five *per cent.* with which he was satisfied; that the *American* sailors had been referred to the courts of *America*, by the *American* ministers; and that *Miller* being considered as an *American*, no separate offer had been made to him, except to settle the matter by arbitration.

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CASES DETERMINED IN THE

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Against the Protest, Laurence and Swabey—This case divides itself into two questions; a question of jurisdiction, and a question of merit on the facts. It is said that there have been cases in which this Court has refused to interfere between foreigners: undoubtedly there have; but those were not cases in which the matter was concluded, as it is in this present case; for it is a material circumstance that this voyage was to have ended at *London*; besides, salvage is a favoured principle of the law of all nations; it is not a matter of domestic jurisdiction, but one that is to be settled and adjusted wherever the voyage ends. It is said that the Court will not entertain suits for wages between foreigners—but for this reason, that the contract for wages cannot be the subject of a suit till the return or end of the voyage. There are, however, other questions which the Court does frequently entertain between foreigners, such as bottomry, on which suits have often been entertained in this court between an *Englishman* and a foreigner, or between two foreigners; as a suit which is to be determined where the voyage ends.

As to the hypothesis of the *Spanish* case, it does not apply; because, if the court of *Spain* had interposed on such an occasion, they would have acted on the principles of *English* law, and on the general law of nations, to assign a *quantum meruit*. In the same manner, these parties, when they have given an appearance, may plead anything particular or special in the law of *America* that they think fit; but otherwise the Court will be at liberty to use its own discretion.

As to the part of the cargo which has been landed, it is to be observed, that this is a matter of prize, and

in such cases the Court has a jurisdiction over the cargo or proceeds, in whatever hands they are found, even on land. In the process of the civil Court of Admiralty it is otherwise; but the prize court is known to have such a power. This is a case of recapture, differing in nothing from a case of capture or prize, and, therefore, it is competent to this Court to follow the proceeds into the hands of the consignees. It is, besides, observable in this case, that the conversion has been made since this monition issued; the parties, therefore, acted after notice, and in contempt of the process of the Court: the monition having issued on the 18th of October, and the sale being stated, even in their own affidavit, to have been subsequent to that time.

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In respect to the merits of the parties—

Court—It seems to me that the question at present is confined simply to the jurisdiction. In this stage I could not proceed to adjudge the reward, was I so disposed. The most that I can do will be to overrule the protest as to the jurisdiction of the Court.

JUDGMENT.

Sir W. Scott—This is a case of an *American* ship taken by the *French*, on a voyage from *Philadelphia* to *London*, and afterwards rescued by her crew.

It is allowed to have been a rescue very much to the advantage of the owners, as a considerable reward has been already paid to the master by the underwriters. I shall not now, however, enter into a discussion of the facts, for the purpose of settling the total of the reward, or the proportions to be assigned, to the particular actors in the service, because a

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previous question has been started respecting the jurisdiction of the Court. It appears that there has been an arrest, by process, of the ship and of such goods as had not been delivered on shore; but that some goods had been landed and delivered whilst a negociation was going on between the parties to settle the reward. —An appearance has been given *under protest*, as to the goods landed: but that cannot, by any possibility, legally avail, except as to those goods so landed on shore, so far as it is founded on the mere circumstance of locality. For the rest an appearance has been given generally. But still I am willing to say, that if there was a well founded objection to the jurisdiction of the Court in general, I should not think it right to hold the parties either to their general appearance or to the mere grounds of their partial protest.

It has been slightly questioned in the act of Court (which contains the exposition of facts given in by both parties), whether there was such a state of hostilities between *America* and *France* as to raise a title to salvage for *American* goods retaken from the *French*. But this point has not been pursued in argument; and, indeed, I should wonder if it had, after the determinations of this Court, which have, in various instances, decreed salvage in similiar cases. It is not for me to say whether *America* is at war with *France* or not; but the conduct of *France* towards *America* has been such *de facto*, as to induce *American* owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of *French* cruisers by force of arms. In this very instance it seems to have been so understood, for the underwriters, representing the owners, have rewarded the

the master of this vessel for an act, which would, on any other supposition than that of subsisting hostilities, have been reprehensible. For although it is meritorious to rescue, by force of arms, from an enemy; it is quite the reverse to rescue from a neutral, from whom the owner would have a right to claim costs and damages for an unjust seizure and detention. If, instead of this, a rescue by force is attempted, and the party takes the law into his own hands, it becomes a breach of the law of nations, which would endanger the ship and cargo, if that attempt should be disappointed: if, therefore, the *French* seizors were to be considered as neutrals, the owners would have reason to complain that this rescue had exposed their property to unnecessary hazard, instead of preserving it. These owners are, therefore, barred by their own act from objecting against the necessity and the legality of salvage, whatever may be the present situation of affairs between *America* and *France*.

This being disposed of, I come now to a second position, that every person assisting in rescue has a lien on the thing saved. He has, as it has been argued, an action *in personam* also; but his first and his proper remedy is *in rem*; and his having the one is no argument against his title to the other. Then where is this lien to be demanded? It should seem that that was an unnecessary question to be proposed, when the goods were admitted to be in *England*: but, strange as it may appear, it is argued that this claim is to be enforced in *America*, because the ship is an *American* ship, and the parties are *American* sailors. In the first place, I am satisfied that these persons are not to be considered as *American* sailors—They are *British*

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British born subjects returning to their own country, without any engagement or intention to go back to *America*, and without having any domicile there, and merely working their passage homeward on board this ship. They are, then, not at all in the condition of *American* subjects; neither are they so to be considered in this act, even if hired as mariners on board this *American* vessel; for this act was no part of their general duty as seamen: they were not bound by their general duty as mariners to attempt a rescue; nor would they have been guilty of a desertion of their duty in that capacity, if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubts whether it ought to be so regarded, I desire not to be considered as one of the persons who entertain any such doubts.—But it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary. The opposition, therefore, to the jurisdiction of the Court fails in its foundation of fact, that these are *American* seamen. But it is asked, if they were *American* seamen, would this Court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs.—In the meantime I will say, without scruple, that I can see no inconvenience that would arise if a *British* court of justice was to hold plea in such a case; or conversely, if *American* courts were to hold pleas of this nature respecting the merits of *British* seamen on such occasions: for salvage is a question of the *jus gentium*, and materially different from the question of a mariner's contract; which is a creature of

of the particular institutions of each country, to be applied, and construed, and explained, by its own particular rules. There might be good reason, therefore, for this Court to decline to interfere in such cases, and to remit them to their own domestic forum : but this is a general claim upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined.

It is said, different countries may have different proportions of salvage ; and, therefore, an inconvenience may arise from such interference. But I do not know that there exists any rule on this matter, beyond that which subjects such matters to a sound discretion, distributing the reward according to the value of the services that have been performed. There is no rule prescribed in the *English* law, nor do I know of any in the codes of *France* or *Spain*, applying to the cases of foreign property rescued. In cases of *rescue* between *English* subjects, this Court usually adopts the proportion of *recapture*; but it is not bound to do so : and in respect to foreigners, there is no rule but that of the *quantum meruit*. Indeed, I believe this is, perhaps, the first case in which a foreign rescue has been made by *British* assistance. As to the case which has been put, of a rescue by a crew, of which nineteen should be *English* and one a *Spaniard*, I cannot see that any great difficulty would ensue. The case of recapture is provided for by the regulations of *Spain*; but I do not recollect that the case of rescue is so; but supposing

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supposing that it is, and that it gives the entire benefit of the rescued property to the rescuers ; and that it was necessary, or at all proper, to decide such a mixed case with any attention to that rule ; the whole effect, and, therefore, the whole inconvenience would be, that one twentieth part of the property would be condemned to that *Spaniard*; for there is no pretence to say that the nineteen *Englishmen* would be entitled to any benefit from such a rule.

These considerations, therefore, found no solid objections against the exercise of the jurisdiction : but I go farther and say, that I think there is great reason for it, because it is the only way of enforcing the best security—that of the lien on the property itself. Between parties who were all *Americans*, if there was the slightest disinclination to submit to the jurisdiction of this Court, I should certainly not incline to interfere; for this Court is not hungry after jurisdiction, where the exercise of it is not felt to be beneficial to the parties between whom it is to operate. At the same time, I desire to be understood to deliver no decided opinion, whether *American* seamen rescuing an *American* ship and cargo, brought into this country, might not maintain an action *in rem* in this court of the law of nations.—But if there was *British* property on board, and *American* seamen were to proceed here against that, I should think it a criminal desertion of my duty if I did not support their claim.

In the present case no *American* seaman has appeared ; nor is it proved that there was any *British* property on board. But as to these *British* seamen holding no connexion with *America*, and having rescued foreign property, I have no doubt that they

are

are entitled to have their services rewarded here; for it would be but a mere mockery, and a derision of their claims, to send them back to America to hunt out their redress against each individual owner of separate bales of goods; it were better to inform them that they were entitled to nothing, than to remit them on such a wild pursuit: I should therefore think it a reproach to the courts of this country, if they were not open to lend their assistance in such a case.

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I must do the owners themselves the justice to observe, that they seem to have been so sensible of the impropriety of such a proceeding, that they have referred the matter to the insurers here in this country; and it has been said that the insurers are the proper persons to distribute the reward. It might happen that property was not insured: what is to be done in such a case? I know of no necessity that exists for an arbitration on such a matter. If the parties agree, and the arbitrators offer such terms, from equity and liberality, as induce them to abide by their arbitration, there can be no objection to that: but to say that the claimants are of right to abide by any arbitration, and that they are compelled to an arbitration, when they have a legal right to a legal decision, is not a very reasonable expectation.

I think I might say without just offence, that insurers, if arbitrations were necessary, are not the fittest persons to be resorted to as arbiters, for this simple reason, that they being generally the persons who are to pay, are not exactly the persons whom a considerate man would select to determine the quantum of payment. On a question between those who are

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to pay and those who are to receive, either of those classes of men are but ill prepared to decide. It will not be understood to be any reflexion on the known liberality of *British* insurers, when I observe, that one great end of the institution of civil society is to prevent men from being judges in cases wherein they are concerned ; and to remit the decision of adverse interests to those who can have no interest whatever in the determination of any such cases. I am of opinion, therefore, that the jurisdiction of the Court is well founded, and that the parties had a right to resort to it ; that the circumstance of the ship and cargo being *American* property will not exclude the jurisdiction where there are any *British* subjects concerned, and where the goods are within its jurisdiction.

But another question arises, Whether the jurisdiction is ousted by the landing of the goods, so far as relates to that quantity landed ? I confess I see no great advantage likely to accrue to the *American* owners from this objection ; because if they take the case from this Court on such a ground, they must go to another ; and if their objection is to a *British* judicature, as I collect from the argument, much is not gained from going to a *British* court of common law : it would be but to change postures on an uneasy bed. But let us see how far this objection can avail : It is said, that the goods being on shore are out of the jurisdiction of the Court of Admiralty.—With regard to the Instance Court, that may be true. In cases of wreck and derelict I have known many instances of great hardship; and I will add, of crying injustice; where salvors have been amused with negotiations till the goods

goods were landed, and then the authority of this Court has been defied, and the just demands of the claimants laughed to scorn. How far such a proceeding would be sustained by a court of common law, is more than it would be proper for me to conjecture; farther than that it seems matter of reasonable doubt how far a change of locality so effected would be permitted to defeat the claims of substantial justice.

There is no reason to surmise such an intention in these parties, although it *does not* appear that the goods were landed after notice that proceedings had been instituted here.

But whatever may be the law as to wreck and *derelict*, I conceive it does not apply to these goods, which I consider to be goods of *prize*; for I know no other definition of *prize-goods*, than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; and there is no axiom more clear, than that such goods, when they come on shore, may be followed by the process of this Court. In such cases the common law courts hold they have no jurisdiction, and are even anxious to disclaim it. The case of the *Ooster Eems*, which has been alluded to, was very different from this: In that case there was a material distinction as to the origin of the subject matter; for it was there expressly said by the great person who then presided, "that those goods had never been taken on the high seas, they had only passed in the way of civil bailment, on delivery into civil hands; and were afterwards arrested on shore as *prize*: it was held, *that there was no act of capture*

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~~The Two Friends.~~ 31st May. Four American seamen, concerned in this rescue, petitioned to be rewarded, and were allowed, *by consent*, 300*l.* each, with their expences.

~~May 16th,~~
1799.

10th May 1799.—In the *Good Intent, Humphries*, an English vessel recaptured from the French, by an American armed ship, the American salvors appeared praying salvage.—Court.—This is an amicable case; there is no opposition to the jurisdiction of this Court. There seems to have been no extraordinary merit, as the American ship was a ship of force, and no resistance was made.—I shall therefore direct the usual salvage of a fifth.

~~April 4th,~~
1799.

THE HAASE, DREYN, Master.

~~A non-commissioned captor rewarded; the whole given.~~

THIS was a case of a ship taken by a non-commis-
sioned captor, and condemned as a *droit* of Ad-
miralty; it was now referred to the Court to reward
the captors.

The facts were—The ship was a *Dutch* vessel, carrying a quantity of gun-powder from *Batavia*, to be distributed among the back settlements at the *Cape of Good Hope*, for the purpose of annoying the *Cape*. The captors took possession of the ship without re-
sistance; but on following a part of the gun-powder which had been landed, they were exposed to the fire of musquetry from the blacks, and were compelled to sustain something of an engagement. It appeared besides that the capturing ship was a *South Sea whaler*, and that she had lost the chief part of the object of her voyage by this service.—The Court gave the whole of the proceeds: one third to the owners of the vessel, and two thirds to the crew, to be divided according to the usual pro-
portions in private ships of war.

The amount of the proceeds was 2900*l.*

THE CORIER MARITIMO, MASTAHINICH,
Master.April 9th,
1799.

THIS was a case of a ship captured on the 13th of November 1796, and carried into *Sbields*.

The claim was given on the 23d of December, and no proceedings having been instituted by the captors, the claimants took out a monition against the captors, to proceed to adjudication, on suggestion that there was an intention of removing the vessel from *Sbields* to *Scotland*.

No appearance was given for the captors till the 26th of February, when they consented to restitution. An application was now made that the claimants might be allowed demurrage.

Court—Demurrage is clearly due. The captor has not only neglected his duty, but there appears to have been an intention of violating it still farther by carrying the vessel into another port, out of the jurisdiction of this Court. On the part of the claimants there has been no precipitation, nor any attempt to throw *sodium* on the captor. They waited nearly two months; and I must not suffer them to be prejudiced by that forbearance.

No appearance is now given for the captors. There has been some misconduct for which they are responsible, and perhaps it ought to call for more than a mere reparation in damage. I shall grant demurrage, referring it to the registrar and merchants to fix the proportion.

Demurrage
given against
a captor for
unjustifiable
detention and
delay, in pro-
ceeding to ad-
judication.

Demurrage assed, on 180 tons, for three months and twenty days—330/-.

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1799.

Freight of con-
traband goods
refused.

THE MERCURIUS, MEINCKE, Master.

THIS was a vessel belonging to merchants of Hamburg, and taken 13th Nov. 1796, on a voyage from Archangel to Rotterdam with a cargo of tar, of which 200 barrels remained unclaimed.

Application being now made for an allowance of freight, the Court rejected the petition (a).

(a) Formerly by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship. Declaration of England and Holland against Spain, 17th Sept. 1625, art. 20, and treaty between England and France Nov. 3, 1653, art. 15. In modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expences. Vide sup. p. 91. *Bynkershoek* strongly vindicates the strictness of the ancient law: “ publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent; & nisi pacta impedianc omisso publicandæ sunt quia earum domini operantur rei illicitæ.” *Byd.* Q. I. P. lib. i. ch. 14. On the same principle, *Heineccius*, “ Quemadmodum ejusmodi pacta ad exceptionem pertinent; ita facile patet regulam estis non tolli, adeoq. certi juris esse, ob merces illicitas naves etiam in commissum cadere.” *De Nov. ad Vett. Merc. Vettit. Commiss.* ch. ii sect. 6.

THE COPENHAGEN, MENING, Master.

*April 9th and
12th, 1799.*

ON a petition to the Court for the settlement of freight for transhipment of Prize Goods, between the ship, cargo, and transhippers.

Question of
freight or trans-
hipment of
prize goods,
between the
ship and cargo
and tranship-
pers.

JUDGMENT.

Sir *W. Scott*—This is a ship not captured at sea, but seized in a *British* port, into which she had been driven by stress of weather; as it has been asserted, “merely on account of the Cargo, the ship being duly documented.” *Duly documented* is altogether a relative term; for a vessel may be duly documented in one case by papers which would not be sufficient documents in another. Thus in ordinary cases, a *Danish* ship would be duly documented by a *Danish* pass, and other papers; but if she appeared to have been bought in the enemy’s country during the war, a bill of sale would be necessary, and that duly verified and supported. In the present case the Court ordered farther proof as well of the *ship* as of the *cargo*—the latter was restored on the 1st of *August* 1797. But the original hearing of the ship not coming on till the 20th of *August* 1797, the ship was not restored on farther proof, till the 28th of *May* 1798. The ship having come in originally in distress, and wanting repairs, it became necessary to take out the cargo; and there being no warehouses at hand, it was put on board three other vessels, which very reluctantly engaged in the service, and were finally induced to do so, by a written contract with the master; and as the

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cargo consisted of commodities brought from *Smyrna*, these ships were obliged to submit to perform quarantine; and the commodities being damaged, these vessels sustained some actual injury by having them on board. As the *Copenhagen* was still farther detained after the cargo was restored, and was therefore unable to prosecute her original voyage, part of the cargo was sent to *London*, and part was put on board other ships to go on the original destination.

On these facts four questions have arisen: 1st, Whether demurrage is due for the detention of the ship? and this question lies between the owners of the ship and the owners of the cargo; for there is no application for demurrage against the seizers, nor any ground for it. 2dly, Whether freight is due for the whole voyage, or only *pro rata*? for that some freight is due is not denied: and this also is a question between the owners of the ship and the owners of the cargo. 3dly, What sum of money is due to the owners of the three ships? 4thly, The last question arises in some measure out of the preceding one: Whether the owners of the *Copenhagen*, or the owners of the cargo, are responsible for this sum of money; and also for the expences of the repairs of the ship, and other charges?

The proprietors of the ship assert that the whole is a matter of simple or particular average on the cargo only: and the owners of the cargo contend that the expences of transhipment are a matter of general average, falling on all parties, and affecting the ship in common with the cargo; but that the ship alone must bear the expences of her own repairs.

In the first place, the ship was not brought in by seizure; there was no bringing into port by capture.

I think

I think it is perfectly clear that she wanted repair; and that she staid in *Milford Haven* for that purpose, as well as for the purpose of proving her neutral character. It appears also, that the proof of the character of the ship took up more time than that of the cargo. Under these circumstances there cannot be the slightest pretence for a claim of demurrage against the cargo, on any ground whatever.

2dly, With respect to the freight, some is *admitted* to be due; as the ship has brought her cargo from *Smyrna* through much the most considerable part of the voyage. But it is said, that in matters of prize, the whole freight is always given; and for this reason, because capture is *considered as delivery*, and a *captured vessel* earns her whole freight. I have already said, that this is not *merely* or *originally* a matter of prize; the ship was not brought in as such; she came in first from distress, and was afterwards put upon the proof of her character: it is a case of a mixt nature; and the maxim that *capture is delivery*, is not to be taken in the general way in which it has been laid down. It is by no means true, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the

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and there might be a simple average for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as if a water-spout should fall on a cargo of sugars, and a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expence which the loss creates, being incurred for the common benefit of both. In this case the transhipping, or rather the unloading of the goods, seems to have been for the common benefit of both; for it was necessary to unload the ship, as well for its own repair, which was become indispensable, as for the preservation of the cargo; and therefore the expence of that transhipment, or rather of the unloading, seems to have upon it the character of a general average, though, possibly, it may be hardly worth while to consider the unloading as a charge distinct from the transhipment—and if so, it should seem to belong to the cargo only. The expence of conveying the cargo to its ultimate destination belongs to the cargo only, the contract having been in effect determined by the payment of freight *pro rata itineris*. As to the expence of the repairs, I think that there is no ground to charge the cargo with that; for the reason, that the ship and the cargo being completely separated by the determination of the contract, and new vehicles provided at the expence of the cargo, the cargo is not answerable for those repairs which it in no degree occasioned. This is what occurs to me upon the view of the matter. It has been intimated that there is a general rule prevailing in such matters among those most conver-
fiant

sant in them—if there is any thing like a *law merchant* on this subject, I should be very unwilling to shake an established rule on mere speculation; and I shall therefore refer it to the registrar and merchants to inquire respecting the existence of such a rule of practice; and if they are satisfied that such a rule exists with a generally received authority, to apply it in ascertaining the burdens that lie respectively upon the ship and upon the cargo, subject to the farther opinion of the Court.

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The registrar and merchants reported, that the amount of the sum to be allowed for the hire of the vessels, ought to be paid by the owners and claimants of the cargo, at the following rate:

	£. s. d.
For the sloop <i>William</i> , 85 tons, for 39 weeks, at 5 <i>l.</i> per week	195 0 0
For the brig <i>Adventure</i> , 160 tons, for 41 weeks, at 10 <i>l.</i> per week	410 0 0
For the sloop <i>Susannah</i> , 65 tons, for 41 weeks, at 4 <i>l.</i> 4 <i>s.</i> per week	172 4 0
	<hr/>
	£. 777 4 0

They were farther of opinion not to allow interest on the above sum; conceiving it to be a sufficient compensation to the parties.

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Freight refused
to a neutral ship
carrying salt
from one
Spanish port
to another.

THE EMANUEL, SODERSTROM, Master.

THIS was a case respecting the allowance of freight and expences to a neutral ship, taken carrying on the coasting trade of the enemy.

JUDGMENT.

Sir *W. Scott*—This is the case of a ship sailing under *Danish* colours, and taken with a cargo of salt, on a voyage from *Cadiz* to *Castropel* in *Gallicia*. The ship has been restored, reserving the question of freight and expences. The cargo has been condemned as the property of the King of *Spain*, and the question now is, under these circumstances, Whether freight and expences shall be allowed in this case?

I shall, first, consider this case upon principle; and, secondly, upon the foundation of authorities.

First, Where a capture is made of a cargo the property of an enemy carried in a neutral ship, the neutral ship-owner obtains against the captor those rights which he had against the enemy. At the same time this principle is not so universal as not to be liable to some exceptions: as, for instance, in the known case of contraband goods. If an enemy puts on board a neutral vessel a cargo belonging to himself, which is a contraband cargo, and that cargo is taken, it is condemnable to the captor; but the Court will not consider itself as bound to enforce the payment of freight, against the captors, although, at the same time, the neutral ship-owner might have just

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just reason to demand it from the enemy; with respect to whom his contract has been performed, as far as he had not been disabled from fulfilling it by the very circumstance of the other contracting party having put a cargo of that species on board, and consequently exposed the vessel to hostile seizure; and the Court may, in like manner, not conceive itself under any obligation to say, in other instances, that the captors are liable to the charge of freight, although it may be a good and valid demand against the owner, which the parties must settle elsewhere.

Now the ground upon which it is contended that the freight is not due to the proprietors of this vessel, is, that she is a *Danish* ship employed in the transmission of *Spanish* goods, from one *Spanish* port to another, and so carrying on the coasting-trade of that country. In our own country it has long been the system, that the coasting-trade shall only be carried on by our own navigation. I observe, that in all the rage of novel experiment that has dictated the commerical regulations of *France* in its new condition, this policy is held sacred; it stands enacted, by a decree 21st Sept. 1793, that no goods, the growth or manufacture of *France*, shall be carried from one *French* port to another in foreign ships under pain of confiscation (a).—The same policy has directed the com-

(a) Les Bâtimens étrangers ne pourront transporter d'un port Français à un autre port Français, aucunes denrées, productions ou marchandises des cru, produit, ou manufaçtures de France, colonies ou possessions de France, sous les peines portées par l'article 3 Loi contenant l'acte de navigation, 21st Sept. 1793, (i. e. confiscation des bâtimens et cargaison & de 3000 liv. d'amende, &c.)

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mercial system of other *European* countries; in the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade. I think therefore the *onus probandi* does at least lie on that side; and always makes it necessary to be shewn by the claimants, that such a trade was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question; but that it was a common and ordinary trade, open to the ships of any country whatever.

Applying that principle to the present case, (if I am right in the presumption,) I am to infer, that this vessel is carrying on a commerce which, according to the general trading system of *Spain* she could not pursue, in consequence of the pressure to which the commerce of *Spain* has been reduced by the arms of this country; if so, upon what ground is it that she claims freight against the captor on a voyage undertaken for the peculiar accommodation and relief of the enemy, under the distresses to which the successful hostilities of the captor's country had reduced him? Is there nothing like a departure from the strict duties imposed by a neutral character, and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and

observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship is taken in an office of this kind, she is entitled to claim against the captor, whom she is thus counteracting and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance?

It is said in argument that this principle, which applied likewise to the colonial trade between the mother countries and their plantations in the West Indies, (that being equally a trade guarded by a monopoly in time of peace, and having been likewise occasionally relaxed under the pressure of a war,) has been in a good measure abandoned in the decisions of the Lords Commissioners of Appeal. I am not acquainted with any decision to that effect; and I doubt very much whether any decision yet made has given even an indirect countenance to this supposed dereliction of a principle apparently rational in itself, and conformable to all general reasoning on the subject. It is certainly true, that in the last war many decisions took place which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce: but under what circumstances? It was understood that France, in opening her colonies during the war, declared, that this was not done with a temporary view, relative to the war, but on a general and permanent purpose of altering her colonial system, and of admitting foreign vessels universally and at all times to a participation of that commerce. Taking that to be the fact, (however suspicious its commencement might be during the actual existence of

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of a war,) there was no ground to say that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and therefore in the case of the *Verwagtig* (a), and in many other succeeding cases the Lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of a war; for hardly was the ratification of the peace signed, when she returned to her ancient system of colonial monopoly. In the present war I am not aware that any judgments of the Supreme Court yet pronounced, have receded from the principle, except in cases, and under circumstances in which a respect to public stipulations and treaties required that the application should be limited; the general principle I take to be entire and untouched, as far as it relates to that trade of the colonies.

As to the coasting trade, (supposing it to be a trade not usually opened to foreign vessels,) can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing any

(a) This was a *Danish* vessel, bound from *Marseilles* to *Martinique*, and back to *Europe*, and taken on the outward voyage; the Vice-Admiralty Court of *Antigua* had given half freight; on appeal the Lords gave the whole.

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thing new into the country, and it certainly is not; but has it not all the effects of such an importation? Suppose that the *French* navy had a decided ascendant, and had cut off all *British* communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life, in this metropolis; is it possible to describe a more direct and a more effectual opposition to the success of *French* hostility, short of an actual military assistance in the war? What is the present case? It is still more—it is the direct conveyance of a commodity belonging immediately to the King of *Spain*, for the purpose of public revenue: the vessel is employed not merely in the private traffic of individuals, but in the revenue service of the state. The King of *Spain*, disabled from employing *Spanish* vessels in the collection of his revenues, enlists foreign vessels under this necessity. Salt is a royal monopoly in *Spain*, as it formerly was in *France*; and it is distributed on the government account to the various provinces. This foreign ship is employed in the distribution, and by the employment becomes an actual revenue cutter of the King of *Spain*. It should seem to be no very harsh treatment of such a vessel, if, on the capture, she is restored, and is only left to pursue her demand of freight against her original employers.

With respect to authorities, it has been much urged, that in three cases this war the Court of Admiralty has decreed payment of freight to vessels so employed: and I believe that such cases *did* pass under an intimation of the opinion of the very learned

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person who preceded me, in which the parties acquiesced without resorting to the authority of a higher tribunal. But a case before the Lords seems to convey a different opinion upon this subject of the coasting-trade of the enemy, the case of the *Mercurius* (a), in which freight was refused. The cargo was lawful under the *Danish* treaty; to the benefit of which the party was entitled as *bona fide* domiciled in *Denmark*, although a native subject of *Great Britain*. I am not able to say precisely how far the circumstance of his birth was an ingredient in the determination of the case; but the general rule is, that a person living *bona fide* in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides; provided it is not inconsistent with his native allegiance. It is conformable to more ancient judgments upon the subject; which have pronounced that "Neutrals are not to trade on freight between the ports of the enemy." To this principle I shall adhere in the present case, leaving the party to such remedy for his demand of freight as he may think fit to pursue; either against the captor by appeal in this country, or against his freighter in the country where he was employed.

(a) This was a *Danish* vessel carrying a cargo of wheat from *Dunkirk* to *Bourdeaux*, and restored by consent, reserving the question of freight: The sentence of the Court of Admiralty refusing freight, was affirmed.

THE AMOR PARENTUM, HENN, Master.

April 13th,
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THIS was a question respecting a priority of seizure, by non-commissioned captors.

A case respecting priority of seizure by non-commissioned persons.

JUDGMENT.

Sir *W. Scott*—The principal question in this case is, Who were the actual seizers? It appears “that the vessel being off *Harwick* in distress, made a signal for assistance; and on the approach of a fishing-smack, the crew declared that the ship was a *Hamburg*er; but that the cargo was *French* property.” This is the master’s deposition: and he says “that he acted so for the purpose of saving his ship, and getting into an *English* port.” The fishing-smack brought the vessel into *Harwick*; and having moored her in such a way as to make it impossible that she should get out again, the master of the boat, leaving one man on board the ship, went to his owner and informed him of what he had done. The owner went immediately to the custom-house, and desired to deliver her up as a *droit* of Admiralty: Then what is there wanting to make a complete seizure? Possession is taken by *British* subjects on information that it was *French* property; and it must, therefore, be presumed to have been done with a complete *animus capiendi*. This was evidently the motive of action; for if they had acted only as mere pilots, they would not have left a man on board to keep possession,

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TUM.

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sion, when every thing was safe ; nor would they have stationed their own vessel near to keep guard, as it appears they did ; nor would they have gone to give information that they had seized a *droit* of Admiralty, as it is proved they did, by the collector.

After all this had passed, an excise-cutter getting intelligence of the state of the vessel, went on board, and made a formal seizure. This must have been a mere idle ceremony ; and indeed it seems to have made that impression on the crew of the captured ship : for it is stated in their depositions on the third interrogatory, “ That they were taken by those who had left them to give information.” For the persons in the excise-cutter to go and take possession afterwards, is arresting a man already in the sheriff’s house : and I am surprised that such a claim should be set up.

The value of the goods appears to have been 1321*l.* and the number of captors ten, besides the owner, whose boat was staved in the service. I shall give the owner by way of encouragement 100*l.* ; 100*l.* to the master ; 80*l.* to the mate, who was left on board ; and 40*l.* to each man.

THE CAROLINA.

*April 16th,
1799.*

THIS was a case of a quantity of silver going from a French port to Hamburg.

Court—This is a claim for a quantity of silver sent from Dunkirk to Hamburg, on board an American ship, and asserted to have been going for the account and risk of merchants of Hamburg. What the Court must require is, to be satisfied that it was going in payment for cargoes already received in France: for it is pretty notorious that the French have been in such bad credit during this war, as to be obliged to remit bullion for their purchases beforehand. If that was to appear to have been the case in this instance, the silver must be condemned as French property. Till it arrived, the shipper I apprehend would be the loser, and not the consignee: for the contract till the arrival, would be what I should call an executory contract. I do not think it is sufficiently proved that it was sent for cargoes received. It will therefore be necessary to see more of the transaction from the correspondence of the parties.

Farther proof ordered on that point.

Silver going from a French port to Hamburg: proof required that it was for cargoes already received.

IN THE INSTANCE COURT.

THE JOSEPH HARVEY, PADDOCK Master.

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1799.

A petition for
salvage on be-
half of a pilot,
appearing to
have advanced
false preten-
sions, and to
have miscon-
ducted himself,
dismissed with
costs.

THIS was a case on a petition for salvage.

JUDGMENT.

Sir *W. Scott*—This is a petition praying salvage; and it is said by his majesty's advocate, that it is impossible for these persons to claim salvage, as there is little more than pilotage due; although it is allowed the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called; for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor. However, let us look into the circumstances of the case, and see whether there is even that pilotage due: for if the fact be, that this pilot has carried the ship to a port where she was not intended to go, without any necessity for so doing, it is carrying the ship out of her course, and putting the owners to a very great inconvenience, and for which no pilotage shall be due.

The case comes before the Court as a case of salvage; and I will take it first upon the affidavits of the asserted salvors; of which I must observe, that they are not

not deficient in exaggeration, but seem to be touched up with a pretty high degree of colouring. They state, " That about one o'clock upon the 27th of November last, they espied a brig at a distance under a signal of distress ; the wind then blowing very hard, and the sea running high : that they nevertheless proceeded to the vessel, though they were, by reason of a very high sea, some considerable time before they could get out to sea," &c. Every body knows that in acts of pilotage, when the sea runs high, there is some degree of peril attending them ; but it is not upon that account that such persons are to be entitled as salvors ; it is a hazardous occupation from the nature of it ; but having taken up that occupation, and the hazard attached to it, they are not to come before the Court to claim extraordinary rewards as belonging to them in consequence of the common perils of that employment which they themselves have chosen.

On approaching the ship, what question did they ask ? They did not ask whether she was in a state of particular distress ; neither do they say whether there was any symptom of distress about her ; but they ask a common and general question, " Whether she wanted to go into harbour ?" If the ship was in a case of great distress, that would have been a very unnecessary question. They go on to state, " That the deponents were then asked by the master of the ship, if there was any harbour under his lee ; and being told of *Ramsgate*, he waved his speaking-trumpet as a signal for the deponents to come on board ; they then lowered their boat's fore-sail to let the brig come up with them, and on her so doing, they attempted to board her on the larboard quarter, but without effect, and were obliged to sheer off."—I fancy that is no

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uncommon occurrence in getting on board a ship that is lying out at sea.—They then state the great difficulty and hazard which they encountered in getting on board; but “ having got on board, (Mr. Toldridge says,) he agreed with the master to take her into *Ramsgate* harbour, and the terms were to be referred to persons *ibere, conversant in adjusting masters of this nature.*”—Matters of what nature? It does not appear to me that this was any thing more than a common act of pilotage; if there was any thing more done, they do not suggest it in their depositions.

Then upon what ground is it that they claim any thing more than for common pilotage? I think there is no reason whatever that this business should be put upon any other footing, according to their own account of it, than the common scale upon which pilotage is settled. They go on to state “ That the helm of the vessel was given up to the pilot, and that she arrived in *Ramsgate* harbour about half-past three o'clock on the 27th day of *November*;” so that according to their own account, it is a very short business. There seems also to be great reason to believe that the weather was not so extremely bad, nor the task so hazardous as they represent it; for the rest of the men appear to have returned in their boat, without danger. They afterwards state, “ that the officers of the customs informed the master that the vessel must perform quarantine; and that he said that his vessel was in want of provisions, and could not leave the harbour.” It appears however that they went out to *Sandgate Creek* to perform quarantine, and remained there till the 5th of *December* following, when the deponent and the other persons

persons left the vessel. They say, "when the ship was navigated into *Ramsgate* harbour the wind blew a very hard gale, and the sea ran very high; and they verily believe, that had it not been for the timely assistance rendered to the brig by the deponents, the master and crew being totally unacquainted with the *Channel*, she would have been in great danger of being lost." But I think there is reason to believe that the sea was not so alarmingly high as they represent; more especially as it is sworn in the affidavit of the other party, "that the wind blew a topsail gale only, being no more than they had been before carrying, and being a very good wind to have brought the brig to anchor in the *Downs*." And as to the ignorance of the master and crew respecting the *Channel*, that is no more than what is usually to be expected in foreign ships. A pilot is to find local knowledge; in so doing he finds no more than what his duty binds him to furnish: so that taking the matter on their own affidavits, it is a mere ordinary case of pilotage.

Let us see however what is the representation on the other side given by persons present at the transaction, being, I think, seven in number.—*Paddock*, the master, says, "That the brig being upon a voyage to the port of *London*, and being arrived off *Dover Castle*, he made the usual signal for a pilot, meaning to go to the *Downs*, and afterwards to the *River Thames*; that in consequence of that signal a boat from *Dover* came along-side the brig with five men on board, of whom *Toldridge* being one, asked him if he wanted a pilot?" (that is exactly the question, and put in the language which the mariners themselves state,) "and where he wished to go in;"

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in ;" to which the deponent replied—" he *did want* a pilot to carry him safe into the *Downs*." *Toldridge* observed, that the wind blew fresh, and it would be better to go into *Ramsgate* harbour; but the master replied, he wished to have his vessel carried into the *Downs*, and that he would by no means have her taken to *Ramsgate* :—that *Toldridge* then came on board leaving his people in the boat; and addressing himself to him in a low tone of voice, desired to speak to him in private; that they went into the cabin, and then *Toldridge* inquired of him what situation the brig was in; that he answered the cables and anchors were new; on which *Toldridge* advised him to take an axe, or let him take an axe and cut the strands of the cables, and cut away the tails, or let them blow to pieces, and let go the anchor, that she might be carried into *Ramsgate* in distress; that he might then make his protest, draw on his owners for 150 guineas, and put 50*l.* of it into his own pocket without injuring his owners, as the loss would fall on the underwriters; or words to that effect." He goes on to say, " That *Toldridge* then advised him to consult with his mate, as he seemed to be but a young man; and assuring him that it was no uncommon thing for *American* captains to do as he had proposed: to which the master replied, that he wanted no man's advice on such a subject."

To be sure if this conversation did pass, it is extremely disgraceful: it is language which no court of justice can receive without strong expressions of indignation against the persons using it. It is little less than a proposal to commit an act of piracy and robbery; and for which, if it had been executed, all the parties, had they been brought before

a court

a court of criminal justice, would have been subjected to penalties which, if they did not affect their lives, might have affected their persons and property in no small degree.

It is said by the counsel for the salvors, that it was very unlikely that such a conversation should have been held: if it is the practice, as this man is made to say it is, it takes away a great deal of the incredibility of such a conversation. If these things are of so familiar occurrence, it is not very likely that there should be much delicacy observed in making the proposal. But I have not only the assertion of the *American* master; there are two other witnesses speaking to the same fact. I can have no doubt after this, that such a conversation did pass: I cannot involve all these persons in the crime of gross perjury, upon the mere improbability of the thing; when it stands upon the otherwise unimpeached credit of three persons swearing that they heard such a conversation. I am of opinion that this disgraceful conversation is very sufficiently proved; and I fear the practice on which it is founded, and to which it alludes, is much too frequent.

It is stated that the pilot took possession of this vessel. On this fact I must say it does appear extraordinary, that he should have been suffered to take the sole possession of the vessel, and carry her into a port against the inclination of the master: for I see no reason why the master might not have turned this man out of the ship, and called another pilot: I think that he would have protected the owners from some inconvenience in so doing; and I hope an honest pilot might easily have been procured: but I suppose he acted for the best, under the particular circumstances

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circumstances of his situation ; and possibly I may not see all the difficulty of procuring another pilot at that moment.

With regard to the course in which the vessel was taken, I presume a ship cannot get round to *Ramsgate* harbour without passing through the *Downs*, or being almost next door to them ; so that the pilot carries this ship through the exact tract where the master wished her to be moored ; and where, as some of the witnesses say, there were ships then lying at single anchor : I think a pilot carrying a ship contrary to the inclination of the master, unless he can show a necessity for so doing, in order to justify such a proceeding, is guilty of a monstrous breach of his duty.

The ship is brought into port ; and there another conversation takes place, respecting what is due for the acts of this pilot ; and it is agreed to leave it to be settled by merchants resident there : but the collector of the customs and another gentleman, who were the persons applied to, say, that the ship appeared, from what they heard of the matter, not to have been in any distress ; and they very severely reprimanded the pilot for having brought her into *Ramsgate* : and were of opinion, that he was not entitled to any salvage. In every part of this judgment I do most heartily concur with them. I think it is a claim set up with the most unpardonable effrontery ; and I am very sorry that I cannot do more than dismiss this petition with costs, and report the conduct of the petitioner to the Trinity-House (a).

(a) Cases of salvage, when they are fairly made out, and are not founded on false and fraudulent pretensions as appeared in

THE ADRIANA, FITZPATRICK Master.

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1799.A case on far-
ther proof.

THIS was a case of a cargo on farther proof.

Farther proof being brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that farther proof opened the case to both parties.

Court—With respect to *plea and proof*, this is true; but I do not know that in proof by affidavits, this Court, or the Lords of Appeal have ever laid down such a rule. I understand the rule to be, that farther proof

in this case, are received in the Court of Admiralty with the most liberal encouragement.

In the *Sarab*, Feb. 15th, 1800, which was a case of salvage on the coast by a boat going out to the assistance of a vessel in distress, the Court expressed its opinion as to the rate of rewarding such services, in these terms:—“ I do not think that the exact service performed is the only proper test for the *quantum* of reward in these cases. The general interest and security of navigation is a point to which the Court will likewise look in fixing the reward. It is for the general interest of commerce that a considerable reward should be held up; and as ships are made to pay largely for light-houses, even where no immediate use is derived from them, from the general convenience, that there should be permanent buildings of that sort, provided for all occasions, although this or that ship may derive no benefit from them on this or that particular occasion; so on the same principle it is expedient for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and therefore that when they are to be paid at all, they should be paid liberally. It is on these general considerations, and not merely to mete out the payment for the exact service performed in the particular instance, that the rewards should be apportioned in these cases; and it is in this view that I shall always consider them.”

by

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by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the Court. It is a proper controul over the rash or light manner with which the claimants may attempt to pick up something like proof by affidavit: But it is not to be exercised except on special grounds; and only with the leave of the Court. I shall therefore hear the cause first on the proof brought in by the claimant.

JUDGMENT.

Sir *W. Scott*—This is a case of a cargo of wine and brandy captured on the 30th of *May 1795*, on a voyage from *Bourdeaux* to *Hamburg*.

The claim is given by Mr. *Boland*, stating himself to be an *American*; but he is clearly not an *American* by birth, as the master describes him to have been born in *Ireland*. Mr. *Boland*'s own account of himself does not carry back his connexion with *America* beyond 1784; therefore we may be warranted to consider him as a *British* born subject, emigrating to *America* after the separation of the two countries.

He says, “that he resided in *Pbiladelpbia* from 1784 to 1794, when, having made several shipments of *American* produce to *France*, and meaning to make others, he thought it material to his interests to be present there, to carry on his mercantile concerns.” This is a large and very general description of his business in *France*. There is no mention of particular business; such as the collecting of debts, or any thing specific; nor is there any thing to remove a suspicion that his business in *France* might be in a most intimate manner connected with *French* commerce. He farther says, “that in *November*

1795, he went from *France* to the *West Indies*, and afterwards to *Philadelphia*." But he does not specify the extent of his visit to the *West Indies*, nor whether it was to a *French* island or not: if so, there would be nothing in this visit to disconnect him from *France*, and he must be considered in the same light as if he was still resident there. There is no proof or mention of his house of trade in *America*, nor any circumstance pointing to a continuance of his connexion with that country, except one, collected by his counsel from the accidental mention of another ship, coming for his account with a cargo of rice and tobacco from *America* to *Europe*. But this might be an adventure having its origin in *France*; and *at any rate* it is not sufficient to support the inference that he still continued to trade as an *American* merchant. He says, " in *August* 1796, he returned to *France* to collect large sums owing to him;" but he does not say, that he had no other business than to collect his debts; but, " that he had no other business than what related to his mercantile concerns." Nor has any one else who settles in the enemy's country as a merchant.—What sort of an account is this? or in what way is it incompatible with the suspicion, that he was become a general trader of that country?

He does not even state an intention of returning to *America*: It is impossible, therefore, to consider him as a pure *American* on this proof; and if this was the whole of the case, I should think it great lenity to allow him to give a farther account of his national character. The original act is not a shipment made of *American* produce, nor with a destination to *America*; but it is a shipment from *France* to another country

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country of *Europe*; it is an original adventure, not springing out of any antecedent transaction, in which the party could be considered as an *American*; and, in short, it is as much a *French* concern as if it was conducted by a *French* merchant. Under these circumstances Mr. *Boland* would find it very difficult to sustain his *American* character; and I should be strongly inclined to hold, that in this individual transaction, he is to be considered as a *Frenchman*. But the use which I shall make of his residence in *France*, will be to see how it bears upon the *bona fides* of this transaction.

It is hardly necessary to observe, that the transactions of neutrals, resident in *France*, are, from the very nature of their situation, liable to great suspicions. They are exposed to great temptations from *French* merchants, who lying under an inability to export their own produce, will assail them with great inducements to cover and protect their trade. The opportunities and facilities of doing it, when parties are on the spot, are innumerable; and that they should not use them, is rather more than we can expect from the virtue of mankind; which is, on this subject, we know, peculiarly frail and vulnerable. It will be necessary, therefore, for the Court to scrutinize all such claims with the minutest attention; and to expect, not, indeed, a mathematical demonstration, but a strong and fair moral probability, that the transaction is such as it is represented to be; otherwise, if this cannot be shewn, the presumption will lie very strong, on the other side, that it is a fraudulent case.

The

The witnesses who have been examined are three, the master, the mate, and one mariner; and, it is said, *the master speaks fully to the property*; but, I think, that is not the fair result of his evidence; for it seems to me that it is impossible, from his own account, that he could believe this cargo to be the property of the claimant. If it were really so, there is reason to presume the master must have been fully apprized of it; for he is doubly connected with the owner in this case, as being his countryman, an *Irishman* migrating to *America*, like himself; as well as being the person under whose care this valuable cargo was placed.

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Mr. *Boland* must have known that it would be prudent to have a cargo of this nature, being a cargo sent from a belligerent country to another *European* port, fully documented; and by *fully documented*, I mean that there should be the regular papers, supported by the knowledge and testimony of the master. Now, what is the master's evidence? to the 12th interrogatory he says, "*he believes Boland is the lader and owner.*" But it appears that *Boland* was not the lader, by the agreement, "*that Corbeaux was to lade the cargo for account of Boland*;" and as to the ownership, the master says afterwards, "*that the goods were to be delivered at Hamburg, but for whose account he does not know, and cannot farther answer.*" And on the 20th, when he is asked whose property it would be if landed? he refers only to his former deposition, and farther cannot answer. So lightly then does he speak, and by reference only to his former account; of which the effect is, in my opinion, nothing.—So much for *bis belief*.

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Then how has he conducted himself, and how do his acts shew that he was impressed with a serious belief that the property belonged to the claimant?

The first step would naturally have been to have given a claim; and so he does for the ship, in *June*. That he should neglect the cargo, if he knew it belonged to *Boland*, is highly improbable; but from the 30th of *May* to the 2d of *September* no claim is given for the cargo; and then it is given by a merchant of this town. There are also letters of the master utterly inconsistent with his belief that *Boland* was the owner of the cargo; for he writes, not to *Boland*, but to Mr. *Corbeaux* at *Hamburgb*, the consignee; stating, “I have taken all necessary steps for the safety of the ship and cargo, as far as I could with propriety.” Yet he had given no claim for the cargo.—He then says, “I have little doubt if *the claimant comes forward he may have restitution.*” This is an extraordinary expression, and applicable to a person who was to be brought forward to claim; but in no sense natural to be used for the proprietor. He goes on, “I would wish to know your friend here, that I may proceed; I have done all I could, and have had my counsel’s opinion,” &c. Am I to understand then, that his counsel advised him not to claim? or what is the result? Looking at the infirm way in which he deposed in his examinations, and the style of these letters, and seeing that he abandoned the cargo, in some measure, by not claiming, I am persuaded he could not seriously consider *Boland* as the owner of this cargo, but as a person to be brought forward to claim as an ostensible owner, whilst the property actually belonged to the person to whom he was writing, or to their connexions.

The second witness knows nothing; but the third witness, the mate, says, "the stower of the cargo told him that the owners of the cargo were merchants at *Bourdeaux*;" and his language, I must observe, is not the language of a forward witness. It is attempted now to contradict this account in a very singular manner, on the declaration of this stower, not on oath. The very form in which this is introduced, satisfies me that the mate gave a true representation of the discourse between them.

Among the papers, there was a bill of lading, and an invoice; which may occur in any case, false or fair: but there is besides a letter, which I think very material to shew the true character of the transaction. It is a letter from Mr. *Boland* to the consignee, dated *May 15th, 1795*; in these terms, "I send you the invoice, and refer you to my former letters of the 2d and 8th. Should the vessel arrive before me, you will make the speediest sale of the wine, but stow the brandy till my arrival." Then, if this is a true letter, he was to go after his cargo (meaning, as appears, to set off by land on the 20th of *May*), and to be the consignee of his own cargo; only on the contingency of his not arriving, his correspondents at *Hamburgb* were to manage the plan of the voyage, as to the wines; but at all events he was undoubtedly to dispose of the brandy himself; for no directions are given, except as to the wine.

This was the state of the case on the first hearing: I will now consider the papers since brought in. There is first an attestation of the owner as to his national character, which leaves that character very uncertain in point of law, and open to great suspi-

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cion on the fact. The attestation also states, " that he purchased these goods of Mr. *Corbeaux*, and paid for them 11,000*l.* sterling by bills of exchange on *Hamburgb*. On this it has been observed, and I think there is a good deal in the observation, that it was extraordinary that he should pay merchants in *France* with bills on *Hamburgb*; having at the same time large sums owing to him in *France*, and none in *Hamburgb*; as it seems that his bills on *Hamburgb* were purchased in the market. There is a certificate from a notary, stating " that he had called at the house of the merchants on whom the bills were drawn and found them accepted and paid;" but still there is no proof that they apply to this transaction; nor do I see that they were in any way connected with this bargain. There is besides a letter of the 23d of *June* from Mr. *Corbeaux* at *Hamburgb*, to Mr. *Boland* in *France*, inclosing the master's letter, and informing him of the capture, to this effect: " This business concerning you, we cannot take any steps without your directions;" and in consequence of this letter, a claim was afterwards given in, but so late as *September*. Among the farther proof there is a letter from *Boland* to *Corbeaux* previous to the shipment, directing an insurance " as interest may appear;" but there is no word of communication or instructions on any other point. The whole is a most puerile correspondence to be sure; more particularly if we consider that it is the first introduction of Mr. *Boland* to these parties: there are no accounts, and no chain of correspondence exhibited. The first letters are of the 2d and 8th of *May*, and the last of the 15th.

Now

Now the first fact that I looked for in Mr. *Boland*'s attestation, was to find what prevented his intended journey to *Hamburg*. This intention was strong and immediate, as mentioned by himself, five days only before the day on which he was to have set off; and yet no notice is taken of this alteration. The capture could not have prevented it; for he mentions this intention so late as the 15th of *May*, meaning to set out on the 20th: but the capture was made not till the 30th. Here then is an abandonment of the ostensible scheme, for which no reason is given. On the contrary, Mr. *Boland* in his attestation speaks of *Corbeaux* as his consignee, in the usual way, without mentioning any thing of his own intention to follow his cargo.

Under all these circumstances, when I see that it was a transaction begun in an enemy's country, and that *Corbeaux* was the lader; when I consider the nature of the cargo, and the use made of such articles, as articles put under particular requisition by the *French* government; when I look at the conduct of the master in abandoning the cargo; and when I see the suspicions suggested by the terms of the letter, "that *Boland* was rather to be considered as the claimant than owner;" I think myself justified in coming to a conclusion, that this is not the property of *Boland*, but of *Corbeaux*, or other *Frenchmen*; and as such I shall think myself warranted to pronounce it subject to condemnation.

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THE THOMAS, M'QUAY Master.

A monition
prayed to
detain a ship
coming into
the port of
Liverpool, for
adjudication, on
the claim of
the former Bri-
tish owner,
suggeſting that
she had been a
slave ship, fei-
zed by the slaves,
retaken by a
British frigate,
and *illegally*
transferred to
the preſent
holder, under
a decree of an
unauthorised
Court of Ad-
miralty at St.
Domingo.

THIS was a *British* slave ship feized by the slaves on board; and afterwards retaken by an *English* frigate, the *Thames*, captain *Lukyn*. She was carried to *St. Domingo*, and there condemned under a decree of a pretended Admiralty Court, erected there without proper authority, and sold. The ship having since come into the port of *Liverpool*, an application was now made on the part of Mr. *Clerke* of *Liverpool*, the former owner, for a warrant to detain her.

Against the Petition, the King's Advocate contended, that although the Admiralty Court of *St. Domingo* was not legally constituted, and though the sentence was consequently irregular, yet since the proceedings of sale had been so public, the Court would not take the vessel out of the hands of a *bona fide* purchaser, especially as captain *Lukyn* had received only one-eighth as salvage, leaving the rest in the hands of the marshal of the Court of *St. Domingo*.

Court—This is a public purchase without doubt, but under a Court which had no jurisdiction. The proceedings, therefore, are not only irregular, but null and void. It concerned the purchaser to look to that as well as the seller. The question is, whether I shall send the purchaser or the original owner to the *captor*? for I will not send either of them to hunt after the pretended marshal of this pretended court. What is proposed by the monition?

[15.]

[It was answered: to keep the ship in the custody of the Court during the suit.]

She will then be unemployed. I think it will be better for the present holder of the vessel to give bail. I shall grant a monition to that effect; and with respect to captain *Lukyn*, I shall allow him a reasonable time to extend his protest, and then to defend himself. The chief difficulty will be with the ulterior part of the case: what is to be done for the present holders, if it shall appear that they have purchased for a fair consideration?

The
Thomas.

April 25th,
1799.

THE EINIGHEDEN, MOLSEN Master.

April 30th,
1799.

THIS was a case of farther proof respecting a cargo of deal planks, and unwrought iron, taken on board a *Danish* vessel, on a voyage from *Riga* to *Legborn*.

A case on far-
ther proof—re-
stored.

JUDGMENT.

Sir *W. Scott*—This was a *Danish* ship laden with unwrought iron and planks; commodities, which, by compact between *Denmark* and this country, are not contraband. This is a very material circumstance in the case. It is besides of great consequence, as to the proof of ownership, that both the master and the mate, in that part of their depositions which respected the property, denied a *French* interest. But doubts have arisen on the question of destination, whether it was to *Legborn* or to a *French* port. Had the cargo been contraband, this would have been a most material inquiry. It is on the 12th interrogatory that

The
EIGHTEEN.

April 30th,
1799.

the doubt first arises: in answer to that the master says, "the cargo was consigned to merchants at *Legborn*, whose names he does not recollect, but they appear by the ship's papers," as undoubtedly they do; but he adds, "the destination was either to *Legborn*, or to some port of *France*: as he should think proper." Afterwards, to another interrogatory he speaks more particularly, and says, "the ship was chartered for *Legborn*; but directions were given to him to go to *Brest*, or to any port in the *Bay of Biscay*." This is not very consistent with his other account. He says besides, "that if he went to *France*, he was to receive five *per cent*." But by accepting such an offer, he discredited himself; for by deviating from his charter party, he would expose the property of his owner to jeopardy from *British* cruisers. The mate, who, we might suppose, would know something of such an alternative destination, contradicts it, and says, "they were bound positively for *Legborn*." It became however necessary to clear up the doubt arising on the destination. On that point, there is now brought in the claimant's attestation in which he speaks fully as to the property; and asserts, "that no authority was given by him, or by any other person, with his knowledge, to go to *France*." It is said there are thirteen other ships spoken of as belonging to the same proprietors, and going with a similar destination; and that it was therefore reasonable to expect a correspondence of a very extensive kind with *Legborn*. It might be reasonable to expect it, if the destination of the other ships had been previous to this capture: But if not, he need not, I think, have entered into all the particulars

lars relating to them ; and in respect of some of these vessels, the destination appears afterwards to have been changed.

Directions are said to have been given to the master, “ in passing the *Sound* to apply to the *Swe-dish* consul for papers ;” but not for any thing more, as I understand it, than mere formal papers. The consul has been examined on this point, and contradicts the master most absolutely, as to any directions said to have been given by him ; and states the destination to have been unequivocally to *Leghorn*.

As the property is fully proved, the destination is become of less consequence. I do think the master has so discredited himself, that little reliance can be placed upon him ; and as the declaration of the *Swe-dish* consul is so express, I shall not think any farther proof necessary.

It was prayed that the claimant might be allowed his expences.

Court—No ; there was no reason for that : there was sufficient need of farther proof.

The
EINIGHEITEN.

April 30th,
1799.

THE JEFFERSON, DENNIS Master.

May 9th,
1799.

THIS was a petition on behalf of the assignees of a bankrupt, who had received restitution jointly with other partners on a former day ; praying that a severance might be made as to his share, and that it might be directed to be paid out of the registry to the assignees.

For

After restitu-
tion *in solidum*
to a house of
trade in Ame-
rica, a prayer
by the assignees
of one partner,
become a bank-
rupt in this
country, for se-
verance of his
share and pay-
ment to them,
refused.

The
JEFFERSON.

May 9th,
1799.

For the Petition, Arnold—contended, that the assignees were the legal representatives of the bankrupt; and as such entitled to demand his share of the property already restored by a decree of the Court. That, as the decree had passed in form *to the party*, if the Court should think it more regular to rescind that form in the first instance, a motion would be made to that effect; but it was apprehended the assignees were as much the legal representatives of the party, as his executors would be if he were dead; and therefore entitled to demand payment of his share under the decree which had already passed without any violation of the forms of the Court.

On the other side, the King's Advocate contended, that this was an attempt to get possession of the property of the house of trade in *America*, which the assignees could not be entitled to, till all the creditors of that house were satisfied, and more especially those who had a particular lien on this cargo; that although the Court of Admiralty will distinguish between neutral and hostile characters, as far as it is necessary for the purposes of restitution, it will not go farther; and no instance has been produced in which this Court has ever interfered to make a severance between parties all neutrals.

JUDGMENT.

Sir *W. Scott*—I thought at first that this question had arisen on the reserved share of that partner, whose national character has not yet been satisfactorily made out to the Court; but now, understanding that the share of this bankrupt was amongst the property restored

stored to the house of trade in *America*, I can have no doubts.

The proceedings have been these; the whole claim was made on behalf of the house in *America*, and three-fourths were restored as claimed: had the fourth share been the bankrupt's, I should have thought the claim of the commissioners very strong; and I should have seen no objection to restore to them instead of the bankrupt, for I accede to what has been said of the representative character of the assignees. But these assignees are not before the Court as claimants; they might have appeared, and have given their claim; they have not done this, and restitution has already passed *in solidum* of three-fourth parts of the property claimed to the members of this house.

The question then is, whether the Court shall proceed again to make a severance between these parties? I cannot think that I have the power to do that: all the severance that was necessary in this case to determine the national character of the parties, has been already made: restitution stands decreed to this house. I am *functus officio*, and I shall not begin again at the prayer of the assignees, who now suggest that one of the partners is likewise an *English* merchant, and a bankrupt. They must resort to some other authority, to make the discrimination between this *American* partnership stock, for the purpose of subjecting a particular share to a *British* bankruptcy. It is no part of the duty of the Court of Admiralty to do this; and I dismiss the petition.

The
JEFFERSON.

May 9th,
1799.

May 9th,
1799.

THE GENERAL WALTERSTORF,
THAARUP Master.

A monition to arrest certain goods as prize goods (not in the hands of the captor, and *not* fully identified) refused.

IN this case *Laurence* moved for a monition on the part of original owners to arrest certain goods lying in a warehouse, on suggestion that they were part of the cargo of the *General Walterstorf*, captured by the *Stork* in the *West Indies*, and illegally condemned in a self-constituted court at *St. Domingo*. It was insisted that the identity of the goods was sufficiently proved by the description given of them by the party advertising them for sale, "as a quantity of tobacco, being part of the cargo of the *General Walterstorf*, and taken by the *Stork* in the *West Indies*."

Court—It does not absolutely appear that the ship is the same. When goods are held for the Captor, it is usual to proceed in this way; but I do not choose to seize goods in this manner at once when they are in the warehouse of another person, and may have undergone a conversion by a fair sale. I am not disposed to grant this monition now. The claimant must first proceed against the captors: they are responsible to him in the first instance,

Monition not granted (*a*).

(a) The registrar observed, that there had been no monition against the captors to proceed to adjudication; that it appeared to him that in regular practice *that* should first pass, and then the claimant might proceed on the intimation.

THE JONGE TOBIAS, HILKEN Master.

May 20th,
1799.

THIS was a case of a ship taken on a voyage from *Bremen* to *Rochelle*, laden with tar. The ship was claimed for Mr. *Schræder* and others; the tar remained unclaimed. The *King's Advocate* and *Croke* contended that the cargo was undoubtedly subject to condemnation, as contraband: that the ship's papers all described the cargo to be the property of Mr. *Schræder*, the principal claimant of the ship: that the master stated "Mr. *Schræder* to be the lader and the owner;" and that there was a bill of lading and certificate of property on oath to the same effect: that on these grounds there was sufficient proof of the property of Mr. *Schræder*, although he had withheld his claim, knowing it would affect the ship: that notwithstanding this artifice the same consequence would follow, as there was sufficient proof of property; and that the whole was liable to condemnation; his own share as being connected with his other property employed in contraband trade; and the shares of his copartners, as affected by the act of their partner and agent; the passport particularly purporting to have been obtained by Mr. *Schræder* on oath that the cargo contained no contraband goods.

Contraband articles, unclaimed, but appearing by all the ship's papers to belong to a part-owner of the ship, held to affect his share of the vessel.

JUDGMENT.

Sir *W. Scott*—There can be no doubt in this case but that the tar is liable to condemnation as unclaimed, and also as contraband, being taken going from a port of the country of which it could not be the produce. Formerly, according to the old practice, this cargo would have carried with it the condemnation of the ship.

The
JONES & TOSIAS.

May 10th,
1799.

ship, but in later times this practice has been relaxed, and an alteration has been introduced which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies only to cases where the owners of the ship and cargo are different persons. Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation. The proofs are very strong that Mr. *Schræder* is the owner of the cargo, although it is not claimed; there is the sworn certificate of the man himself; and all that is said on the other side is, that there is no claim. There may be cases in which the conduct of a man may prevail against the evidence of the ship's papers: but there is here only a continuance of the same fraudulent discretion which has guided his conduct throughout; as he must be aware that an acknowledgement of the fact by claiming would involve the ship. His share must be subject to condemnation.

The only question is, whether there is proof that there are more owners of the ship than one. I think it does appear that there are other persons concerned in the ship; although they do not appear to be affected with a knowledge of the cargo: the presumption is against them certainly, but that is not sufficient to induce me to go the length of condemning their shares. What I shall do will be to condemn Mr. *Schræder*'s share; and require an attestation of the other part owners that they had no knowledge of the contraband goods; for being only part owners of the ship, and not general partners with Mr. *Schræder*, I shall not hold them to be necessarily affected by his criminal acts.

THE ANNA, BEER Master.

May 21st,
1799.

(A Motion for the Examination of a Witness.)

IN this case an application was made on the part of the claimants for the examination of a witness produced by them. The circumstances were: two days after the vessel came into port, a man produced himself as supercargo, and offered papers in his possession: the commissioners refused to examine him; and it was for the benefit of his evidence that the motion was now made.

Court—If the affidavit had stated the papers to have been offered immediately, and refused, I might receive these papers; but as it now stands, I shall not direct them to be received.

IN THE INSTANCE COURT.

(A Motion on a Ship unknown.)

IN this case—*The King's Advocate* stated, that after the ship had been taken possession of, under warrant of the admiralty, as derelict, and the cargo had been put into a warehouse by the agent of the admiralty; the warehouse had been broken open and the cargo taken out and sold—on these facts he prayed, that an attachment might issue against the parties, and that they should be directed to produce an account of sales.—The registrar, being consulted, said he had not met with any case exactly similar; that the usual practice, was not to arrest in the first instance; although there was no doubt of the power, as in cases of wearing illegal colours, the first step was usually to grant a warrant to attach the person grounded on an affidavit of the fact.—Precedents were directed to be consulted.—

On contempt—
Motion to
show cause.

On

On the 24th *May*, the Court said, “ I have considered this matter, and decree a monition to show cause why an attachment should not issue for contempt.”

May 24th,
1799.

Blockade.—Inquiry at the mouth of the harbour as to the continuance of the Blockade—under what circumstances allowed.

THE BETSEY, GOODHUE Master.

THIS was a case of an *American* ship taken by the *French*, on a voyage from *America* to *Amsterdam*, retaken by the *English*, and proceeded against for an intentional breach of the blockade of *Amsterdam*.

For the Captors, the King's Advocate—There seems to be no reason to question the property in this case; but every paper on board points to a destination to *Amsterdam*. It is proved also, by the instructions given to the master, that the owner was perfectly aware of the blockade of *Amsterdam*: they direct him, “ If you should not be so fortunate as to get into *Amsterdam*, owing to the *English* ships still keeping up the blockade, which you will know by speaking those which lie off—you may go to *Hamburg*.” It appears by these instructions, that the information was to be sought for only at the entrance of the harbour; which is not to be held up as a measure of candid inquiry, as it gives the party the utmost latitude of eluding the *British* cruisers on that station; and was rather a guarded expedient of fraud, than a fair alternative destination—If they really wished for information, the master should have been directed to call at some *British* port. To allow neutrals to go to the very mouth of the *Texel* is opening a door to great fraud.

frauds.—There are, besides, no instructions to consignees at *Hamburg*; therefore there is reason to believe that this part of the instructions to the master was merely colourable. On these grounds it is submitted, that this ship was subject to condemnation from the moment of sailing on this destination.

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For the Claimants, Laurence—The material circumstance that distinguishes this from some other cases, is the distant residence of the owners; which made it necessary for them to give discretionary orders of this kind, as they could have no immediate knowledge when the blockade should cease, and must, therefore, without such provisional orders, be thrown considerably behind the rest of the world in their commerce to that port when it should be again opened: The alternative instructions were therefore necessary; and nothing has appeared in any part of the case that, in any way, exposes them to the imputation of fraud. There was no actual attempt to evade the blockade, as the ship was taken by the *French* before she had made half her voyage, and recaptured by a *British* cruiser off *Bordeaux*. The alternative destination is still less liable to exception as a colourable destination. The cargo consisted of rice and tobacco, which are articles of a general merchantable nature, adapted to all markets. There is nothing pointing exclusively to *Amsterdam*, more especially if the ulterior purpose of this voyage is considered, which was to have proceeded to *Russia*, after having obtained letters of credit for that market.

JUDGEMENT.

Sir W. Scott—I hardly think that there is sufficient evidence in this case to affect the parties with an intention

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tention of fraud. The ship sailed in *January* last, when the owners were certainly informed of the blockade; but the distance of their country is a material circumstance in their favour. I certainly cannot admit that *Americans* are to be exempted from the common effect of a notification of a blockade existing in *Europe*. But I think it is not unfair to say, that lying at such a distance where they cannot have constant information of the state of the blockade whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them; if they were bound rigidly by the rule which justly obtains in *Europe*; that the blockade must be conceived to exist, till the revocation of it is actually notified. For if this rule is rigidly applied, the effect of the blockade could last two months longer upon them than on the trading nations of *Europe*, by whom intelligence is received almost as soon as it is issued. That the *Americans* should therefore send their ships upon a fair conjecture that the blockade had, after a long continuance, determined, and for the purpose of making fair inquiry whether it had so determined or not, is I think not exceptionable; though I certainly agree that this inquiry should be made not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud. In the present case, the blockade had been understood in *America* to have existed the whole winter, and the ship was not to be liable to it in *January* and

and therefore it was not unreasonable to suppose that by that time it had ceased.

The papers all bear an avowed destination to *Amsterdam*—which I think a favourable circumstance, and, in some degree, destroys the suspicion of fraud: if there had been a fraudulent intention, *Amsterdam* would not have stood so prominent to observation. The directions certainly contain some expressions which are rather awkward—“If you should not be so fortunate as to get into *Amsterdam*:” this is rather an alarming expression; but perhaps it may be a criterion of a fair case; a designing man would have been more cautious in the choice of his expression. The master was directed to inquire of the blockading frigates: I have already said that he ought to have been directed to inquire elsewhere—in the ports of the *Channel*. But, on the whole, as the property is not disputed, and as the papers all speak openly, I do not think there is anything to affect the owners with a fraudulent intention, and therefore I shall restore (a).

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(a) In a later case, the *Posten*, *Hyll*, 8th *August*, 1799, a *Danish* ship from *Drontheim* to *Amsterdam*, taken off the *Texel*, and proceeded against for a breach of the blockade of *Amsterdam*. The same excuse was made, that they expected to receive information on the spot; and the *Betsy*, *Goodhue* was cited.—The Court said, “Ships must call somewhere to obtain information, for the Court will not allow the information to be obtained at the mouth of the blockaded port.” The case of *America* is different; though even in their case it must be understood that the blockaded port is not the proper place for inquiry. But here in *Europe*, where the different states have constant intelligence, and may be said to live as it were under one roof, it shall never be permitted that a ship shall sail with a knowledge of the blockade.

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THE VROW MARGARETHA,
CRIGSMAN Master.

Brandies transferred *in transitu* from a Spanish merchant to a neutral before the breaking out of hostilities—restored.

THIS was a case of a cargo of brandies, shipped by Spanish merchants in Spain, in May 1794, before Spanish hostilities, and transferred to Mr. Berkeymyer at Hamburg, during their voyage to Holland.

For the Captors, the King's Adv. and Sewel contended, That the property of these goods was to be considered under the original shipment, as belonging either to the shippers in Spain or to the consignees in Holland—that in either case, in consequence of what had taken place between the two countries subsequent to hostilities, they would be subject to condemnation—that it had been the invariable practice of the Prize Court to look only to the time of shipment, and that no instance of a claim being sustained for goods purchased of the enemy *in transitu*.

For the Claimants, the Adv. of the Adm. and Lawrence contended, That the rule relied on might be true in shipments made in an enemy's country in time of war; but that it could not apply to a case like this, in which shipment being previous to hostilities, (and before they could be *in any way foreseen*),

under pretence of further inquiry at the very spot blockaded.—Condemned.

So in the practice of Holland—"Quæ cæm proxima locis obsefis deprehenduntur, non alia ratione publicantur, quam quod ex facto tacite ad hostem communiadi propositum colligatur; idemque esse, si id ex instrumentis perspicue constet, non est car dubitans.

Bruk, Q. J. Publ. li. ch. ii. page 90.

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furnished a just exception to the rule; and was also a sufficient answer to any suspicion of a fraudulent or collusive transfer.

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JUDGMENT.

Sir *W. Scott*—This is a claim of Mr. *Pb. Berkeymyer* of *Hamburg* for some parcels of wine which were seized on board three *Dutch* vessels detained by order of government in 1795. The ships have been since condemned; the cargoes were described in the ship's papers, as far as the property was expressed, as belonging to *Spaniſh* merchants. It is material, in this case, to consider the relative situation of the countries from which and to which these cargoes were going. *Spain* and *Holland* were then in alliance with this country and at war with *France*; it might, therefore, be an inducement with a *Spaniſh* merchant to conceal the property of his goods, although it *does not* appear to have existed in any great degree, as the goods were coming under an *English* convoy, and as they were shipped “as *Spaniſh* wines,” and destined, avowedly, to *Holland*; there was, therefore, nothing in this part of the case to mislead our cruizers. Mr. *Berkeymyer* is allowed to be an inhabitant of *Hamburg*, although he had made a journey, a short time previous to the shipment of these cargoes, to *Spain*, (where he had resided some years before,) to settle his affairs, and bring off the property which he had left behind him. He had quitted *Spain*, however, previous to the breaking out of *Spaniſh* hostilities, and had resumed his original character of a merchant of *Hamburg*.—The account which he gives of his transactions in *Spain*, as far as they regard this case, is,

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that he entered into a contract with two *Spanijs* houses for some wines, which were at the time actually shipped, and *in itinere* towards *Holland*. The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained, there would be an end of the question, because it has been admitted that these wines were shipped as *Spanijs* property, and that *Spanijs* property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) such a transfer *in transitu* might certainly be made. It has even been contended, that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did exist, all goods shipped in the enemy's country, would be protected by transfers which it would be impossible

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impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.

It has been farther objected to the validity of this contract, that a part of the wines did actually reach *Holland*, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract—to the extent of that part it may do so, and the deficiency must be made up to the purchaser by other means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to *Peterburgh*. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the execution of the contract so rigorously as to extend it to those wines which never went to *Holland*, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

It comes then to a question of fact, whether it was a *bona fide* transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months later, there might have been reason to alarm the prudence of

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Spanish merchants, and induce them to resort to the expedient of covering their property.—But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point.

The instruments of sale have been produced, and no observation has been made upon them. The correspondence has been exhibited, and there is certainly some confusion in the dates. Explanations have been given, which are probable enough; still they are but conjectural. If the counsel for the captors require it, I will order the original documents in proof of these explanations to be produced; although I must say, at the same time, that the impression upon my mind is, that it is a fair transaction.

The originals decreed to be produced.

Jan. 15th, 1800. The captors being satisfied with the farther proof produced, Mr. Berkeymyer's claims were restored without opposition.

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1799.

A vessel sail-
ing under
convoy of an
armed ship for
the purpose of
refusing visita-
tion and search
condemned.

THE MARIA, PAULSEN Master.

THIS was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron, to several ports of France, Portugal, and the Mediterranean; and taken, Jan. 1798, sailing under convoy of a ship of war; and proceeded against for resistance of visitation and search by British cruizers.

In December 1797, this case coming on to be argued on the original evidence (a), when the Court directed farther

(a) Of the very long and able discussion which this case underwent, it is the argument immediately preceding the judgment that

farther information by both parties, respecting the precise acts that took place at the time of capture—the instructions under which the convoyed ships were sailing, and also the instructions to the *Swedish* frigate.

On a subsequent day this information being produced, it was again argued at much length.

On the part of the Captors, the King's Advocate and Arnold, in substance contended—If the case of this ship and cargo were to be considered singly, and separated from the principal question of convoy, there are many circumstances attending it of a very noxious aspect. It was going on an asserted destination to *Genoa*, at a time when that port was become almost a hostile port, by its subserviency to all the purposes of the *French* marine, whilst our ships and cruisers were absolutely excluded. It was going under the *certificate* of the *French* consul, in compliance with the unjust *decrees* of the *French* government (a); and the articles of which the cargo consisted,

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that the editor has principally ventured to abstract: on the former hearing many topics of a more general nature were strongly urged on the part of the claimants. As the substance of these and of the whole case is reduced to ten general positions, offered as the *reasons of an appeal* now depending; the editor is anxious to relieve himself from the responsibility of abstracting a very wide range of arguments, used as *different bearings*, on so important a subject, by referring the reader to the end of this case for the statement of those reasons drawn up with great care and attention in the words of the parties themselves; and for the final decision of this great question, if it should be determined before the last sheet of this Number goes to the press.

(a) Decree 18th Jan. 1797—“L'état des navires en ce qui concerne leur qualité de neutre ou d'ennemi sera déterminé par leur

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confissted, were articles of a contraband nature. It is true they are such articles as the *Swedes* are now permitted to carry in time of war under certain circumstances, but only under a strict observance of good faith, a conduct perfectly neutral, and in all cases subject to a right of *pre-emption* on the part of a belligerent nation. And farther, the truth of this asserted destination to *Genoa* is exposed to great suspicion from the discretionary power, with which the master was intrusted, of going elsewhere.

These are circumstances unfavourable in themselves; but they assume a more distinct hostile character from the circumstance of being taken, sailing under the protection of an armed force, and associated for the purpose of resisting visitation and search from the cruizers of this country. The act of resistance to the lawful rights of search is the ground on which it is principally contended that this case is subject to confiscation: for although this fact may receive colour and complexion of a more hostile nature from other circumstances, it is alone sufficient to incur the penalty of confiscation. The right of visitation and search in time of war, even in the most innoxious cases, is an established right of belligerent powers, acknowledged and referred to in the treaties of the

leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre, ou de ses possessions, sera déclaré de bonne prise, quelque soit le propriétaire de ces denrées ou marchandises."—See *Atcherson's Report of a Case in King's Bench*, Appendix, page 155, where the reader will see the late regulations of the French government in matters of prize.

In consequence of this decree, all neutrals were required to take a certificate from the French consuls that their goods were not of *British* produce or manufacture.

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States of *Europe*. It is admitted by all speculative writers on the law of nations. *Bynkerboek* expressly admits it in these words: “*Velim animadvertis, catus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri; sed ex ipsis instrumentis in nave repertis constat navem amicam esse.*” Lib. i. ch. 14. And *Vattel*, L. iii. sect. 114. acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible this right may be wrongfully exercised by cruizers, resistance is not the legal remedy, as there is a regular and effectual remedy provided by all the maritime codes of *Europe*, in the responsibility which cruizers lie under to make compensation, for any injurious exercise of this right, in costs and damages. These principles being admitted, as they were indeed admitted in the former hearing, it becomes a question of fact, Whether there was that hostile resistance that will subject the parties to the penalty of confiscation? On this point it is submitted, that the instructions of the *Swedish* government to the commander of this convoy (a) lay upon him as a positive

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(a) Instructions to the commander:

“ In case the *Lieutenant-Colonel* should meet with any ships of war of other nations, one or more of any fleet whatever, then the *Lieutenant-Colonel* is to treat them with all possible friendship, and not give any occasion of enmity; but if you meet with any foreign armed vessel, which on speaking should be desirous of having still farther assurance that your frigate belongs to the king of *Sweden*, then the *Lieutenant-Colonel* is, by the *Swedish* flag and salute, to make them know that it is so; or if they would make any search among the merchant ships which are under your convoy, which ought to be endeavoured to be prevented as much as possible

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a positive injunction to prevent search by all possible means, and "that violence must be opposed by violence." These are carried into execution by the sailing orders (a), which forbid their merchantmen "to submit to search; but if any boat attempted to come alongside, to sheer off from them." It is still farther carried into effect by all that passed at the time; and more especially by the act of forcibly removing an officer who had taken possession of one ship, and carrying him on board the frigate: and it is again confirmed by the regret which the commander expressed that he had not fired, protesting, "that if the ships had not been seized at night he would have resisted."

For the Claimants, Laurence and Swabey—The original importance of this question, great as it undoubtedly was, has been very materially increased by the manner in which it has been brought on.

The claimants have reason to complain that every thing has been brought forward *ex parte* by the captors. The instructions of the Swedish commander are produced in an unauthenticated form, and intro-

possible, then the Lieutenant Colonel is, in case such thing should be insisted on, and that remonstrances could not be amicably made, and that notwithstanding your amicable portment, the merchant ships shall be nevertheless violently attacked, then violence must be opposed against violence."

(a) Sailing instructions to the merchantmen:

"All merchantmen ships, during the time they are under convoy of his majesty's ships, frigates or sloops, are forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching, but in case such boats shew an intention to come alongside, the merchant ships are to sheer off from them."

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duced only under a note from the under-secretary of state. It is not proved that they were the whole of the instructions: it must therefore rest with the Court to say how far they are sufficiently authenticated. The instructions under which the *English* commander acted have been altogether withheld. On the part of the claimant's evidence, the officer of the *Swedish* frigate has been sent away to render an account to his own government, and by that means the parties are deprived of the benefit of his evidence. Under these disadvantages, however, it is still to be contended that there has been no act of hostility committed against this country. There is no disposition to assert a right on the part of neutral merchant ships to resist visitation and search by the cruisers of a belligerent state. It is not to be argued undoubtedly that neutrals have a right in all cases to resist search. If such a speculative doctrine is asserted by any states, it is for them to maintain it: In the present case we stand upon no such position, but upon something which appears to have been overlooked—a treaty on this important question of search between the two countries: Treaty between *England* and *Sweden*, 1661, art. 12. After an express treaty, it is not allowable to *presume* anything contrary to that compact on the part of the other state; nor to argue on general principles to defeat the force of the obligation arising from it on our parts. Search is by this treaty to be exercised only on a refusal to produce the certificates or ship's papers; in no other case is it justifiable: and although a strong suspicion might still justify a seizure under the responsibility of costs and damages; still, in the manner of making this seizure, (and the whole of this case rests on the course of the proceedings,) if we did not

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not proceed in the manner in which we ought to have done, there is an end of our right under the compact; and we are not at liberty to impute any thing that ensued in consequence of our own irregularity, as an act of aggression against the other party. These are the principles on which it is intended to support the present claim. Originally, and in its natural appearance, this convoy is to be considered as a neutral convoy; and therefore it lies on the captor to show by *some act* that there was a departure from neutrality; for it cannot be pretended that a mere intention (if it were proved) would be sufficient, under any system of law, to incur the penalty of an actual offence. It seemed to be admitted by the Court on a former day, that there was a just distinction to be made between two cases of convoy—between a convoy of an enemy's force and a neutral convoy. The former would stamp a *primary* character of hostility on all ships sailing under its protection; and it would rest with the parties to take themselves out of the presumption raised against them. But that it would be, even in that case, nothing more than a presumption, is determined by a late case before the Lords.—The *Sampson Barney*, an asserted *American* armed ship, sailing with *French* cruisers at the time they engaged some *English* ships, and communicating with the *French* ships by signal for battle. In that case, although there had been a condemnation below, the Lords sent it to farther proof, to ascertain whether there had been an actual resistance.

[Court—I do not admit the authority of that case to the extent you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible.]

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In the other case of a neutral convoy—there is no presumption of a hostile character arising from it; and therefore it remains with the captors to shew that there was an actual resistance in this case. Coming then to the question of fact, with the provisions of the treaty kept constantly in view; when remembering that there is a treaty regulating the mode and manner of proceeding, and both parties are bound to proceed accordingly; and that the presumptions also which are raised, should proceed upon the words of that compact, and not depart from it; where will the captors find any actual resistance in the conduct of these parties?

The instructions are relied upon—but they are general, and do not any more than the other circumstances preceding or attending this transaction, point, in any degree, to a resistance towards this country.—It is notorious, that at the time of passing the *French* decree against *English* merchandise, which is deservedly reprobated on all sides, the *Swedish* merchants did apply for a protection of this kind—and therefore the probability is, at least, as great that it was intended to protect them against *French* cruisers as against this country. The directions are, to observe an amicable deportment—but that violence must be opposed by violence; expressions on which it will not be fair to put any construction than what is compatible with the provisions of the treaty, or to suppose that they meant more than that the stipulations of the treaty were to be faithfully maintained.—What passed then at the time?—Was there anything like actual personal resistance?—“Certainly not.—From the evidence of *McDougal* it appears that there was nothing like an hostile appearance shewn towards the *Wolverine*: till after

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after four days had passed in discussion between the commanders. The *Swedish* commander had a right to expect to have been first addressed: under the treaty the certificates should have been demanded; —if not produced, the ships might have been searched; and, on strong suspicion, seizure might have been made.—But the question is, Have the captors proceeded in this way? If, in opposition to this they have at once superseded all forms, and said, we *seize and detain*, the matter assumes a different aspect, and we have no right to exact a rigid observance of form on the other side. On descrying the convoy, what was done on the part of the captors? It was on that side that the first appearance of menace was shewn—the *English* ships immediately beat to quarters—the destination is inquired of—and an answer given—but there is no demand for papers—no attempt to search.—Capt. *Lawford* states, that, as a measure of prudence, he sent immediately to the Admiralty for particular instruction, and received orders to detain the convoy. On the first interview the *Swedish* commander immediately communicated his instructions with the greatest readiness; from which it appears, that, in his opinion, they contained nothing hostile to this country. The removal of a petty officer, that has been relied on as an act of resistance, was more a matter of form than actual opposition, used as a sort of protest against the irregular proceeding of the captors, and did not for a moment retard the actual delivery of possession on the part of the *merchantmen*. The subsequent acts shew still more strongly how little the acts of the captors were directed by the treaty; and how little they themselves thought that any penalty of prize had accrued to them by this circumstance of con-

convoy. Instead of the usual demand for the ship's papers *in the first instance*, they were not demanded till *August*. They were afterwards returned to one vessel, and an offer was made to all those bound to neutral ports to depart—but they refusing to go without some compensation for detention, proceedings were then instituted for the first time, on the principle of convoy—a principle which cannot now come into discussion, owing to the irregular proceedings of the captors—and which, besides, cannot fairly be enforced against the merchantmen, *by this Court*, whilst the *Government* has permitted the frigate to depart, and has declined to consider the act of the *Commander* as an act of hostility against the *State*. On these grounds, and adverting to former practice, in which some instances occur of restitution of ships taken under convoy, whilst no precedents of condemnation on this principle are adduced; it is submitted that the claimants have done nothing to forfeit their neutral character, and are therefore entitled to restitution.

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JUDGMENT,

Sir *W. Scott*—This ship was taken in the *British* channel in company with several other *Swedish* vessels sailing under convoy of a *Swedish* frigate, having cargoes of naval stores and other produce of *Sweden* on board, by a *British* squadron under the command of Commodore *Lawford*.

The facts attending the capture did not sufficiently appear to the Court upon the original evidence; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attestations made on the part of the captors, and of a copy of the instructions under which the *Swedish* frigate sailed, transmitted to the king's pro-

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tor from the office of the *British* secretary of state for the foreign department. On the part of the *Swedes* some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture.— On this evidence the Court has to determine this most important question; for its importance is very sensibly felt by the Court. I have, therefore, taken some time to weigh the matter maturely; I should regret much, if that delay has produced any private inconvenience; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the Court,) that I have interposed more time in forming my judgment than was fairly due to the importance of the question, and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality.—It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at *Stockholm*;—to assert no pretensions on the part of *Great Britain* which he would not allow to *Sweden* in the same circumstances, and to impose no duties

duties on *Sweden*, as a neutral country, which he would not admit to belong to *Great Britain* in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special confederation which I shall notice in favour of *Great Britain* (and which I am entirely desirous of allowing to *Sweden* in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of *Europe*, when I declare that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of *Great Britain* and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted—and if authority is required, I have authority—and not the less weighty in this question for being *Swedish* authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced, I mean Baron *Puffendorff*(a): the passage to

* *Puffendorff* was not actually born in *Sweden*, but is usually claimed and allowed as a writer of that country, from his employment in it under the King of *Sweden*. The great work on which his fame is principally built, was given to the world during his residence in it.

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which I allude is to be found in a note of *Barbeyrac's*, on his larger work, *L. viii. c. 6. f. 8.*—*Puffendorff* had been consulted in the beginning of the present century, when *England* and other states were engaged in the confederacy against *Louis XIV.* by a lawyer upon the continent, *Groningius*, who was desirous of supporting the claims of neutral commerce, in a treatise which he was then projecting. *Puffendorff* concludes his answer to him in these words:

“ *I am not surprised that the northern powers should consult the general interests of all Europe, without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. Those princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power which threatens Europe with slavery, and the protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expence in the affair, and run no hazard.* ”—In the opinion, then, of this wise and virtuous *Swede*, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states.—His words are memorable:—I do not over-rate their importance, when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely without notice, as another preliminary observation, (though without meaning to lay any particular stress upon it,) that the transaction in question took place

place in the *British* channel, close upon the *British* coast, a station over which the Crown of *England* has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors; for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain *Lawford* introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered, "that they were *Swedes*, bound to different ports in the *Mediterranean*, laden with hemp, iron, pitch, and tar." Upon doubts which Captain *Lawford* entertained respecting the conduct he should hold in a situation of some delicacy, he dispatched immediately a messenger to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by the return of his messenger to detain these merchant ships and carry them into the nearest *English* port, he sent

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Sir *Charles Lindsay* and Capt. *Raper* to communicate them in the civillest terms to the *Swedish* commodore, who shewed his instructions to repel force by force if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the *Swedish* frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the *British* squadron to prepare for battle.—In the night, possession was taken of most of the vessels, the *Swedish* frigate making many movements, which were narrowly watched by the *Romney*, keeping close under his lee, lower deck guns run out, and every man at his quarters. In the morning the *Swedish* frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the *British* officer who had been left on board, and carried him on board the frigate, where he was detained. The *Swedish* commander sent an officer of his own on board Capt. *Lawford* to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into *Margate Roads*, and returned the *British* officer who had been taken out and detained on board the frigate. After the arrival in *Margate Roads* he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

Capt,

Capt. *Raper* states, that on going on board the *Swedish* frigate he found all the men at their quarters, and the ship clear for action; that the commodore shewed his orders and expressed his firm determination to carry them into execution. Capt. *Lawford* sent a boat with an officer on board several of the convoy, to desire they would follow into *Margate Roads*; their answer was, they would obey no one but their own commodore.

Lieut. *M'Dougal* describes in like terms the menacing appearance and motions of the *Swedish* frigate.—He was sent to take possession of vessels which would not bring-to without firing at them. On his going on board one of them, the master declared that he had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the *British* mariner, who, by his order, took possession of the helm.

Mr. *Cockraft* is another witness to the same effect, and Mr. *Candish*, the officer who was taken by force out of the *Swedish* merchantman. Expressions of strong reproach against the proceedings of the *English* were addressed to him, and the commodore protested, that if he had not been surprised he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts—That a large number of vessels, connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the *Mediterranean*, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met

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with, close upon the *British* coast, by his *Britannic* majesty's cruisers—that a continued resistance was given by the frigate to the act of boarding any of these vessels by the *British* cruisers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior *British* force which overawed it—that the act being effected in the night, by the prudence of the *British* commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night—that a forcible recapture of one vessel took place, and a forcible capture and detention of one *British* officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the *British* force had awed this *Swedish* frigate into something of a stipulated submission.

So far go the general facts.—But all this, it is said, might be the ignorance or perverseness of the *Swedish* officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr. *Raper*'s log, which proves that the merchantmen refused to admit the *British* officers on board, and declared that they would obey nobody but their own commodore; a fact to which Mr. *M'Dougal* likewise bears testimony. It is contradicted still more forcibly by the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels.—The latter have been brought into court by themselves, and of the authenticity of the former there is no reasonable doubt; for they are transmitted to me upon the faith of one of the great public offices of the *British*

British government, and no person disavows them; and indeed nobody can disavow them, because they were produced by the *Swedish* captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the *British* Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the Court; because if the act of the captors was illegal, the orders of the Admiralty would not justify it; and the want of orders would not vitiate, if the act was legal. No mystery, however, was made about these; for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruizers of *Tripoli*, and an affidavit has been brought in to shew that that government had begun hostilities against the *Swedes*.—The language, however, of these instructions is as universal as language possibly can be; it is pointed against the “ fleets of any nation whatever.” It is, however, said that this was merely to avoid giving offence to the *Tripoline* government. But is the *Tripoline* government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state, merely to save appearances with a government which, they alledge in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it is

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is clear that if it had been so, the commander of the frigate must have had most explicit instructions to that effect. They could never have put such general instructions on board, meaning that they should be limited in their application to one particular State, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use: whereas nothing can be more certain than that he had been left without any such restrictive instructions; he therefore acts, as any other man would do, upon the natural sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these—they are incapable of being misunderstood: “In case the commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the commander is to treat them with all possible friendship, and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should be desirous of having further assurance that your frigate belongs to the king of Sweden, then the commander is by the Swedish flag and salute to make known that it is so; or if they would make any search amongst the merchant-vessels under your convoy, which ought to be endeavoured to be prevented as much as possible, then the commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made, and that notwithstanding your amicable comportment the merchant-ships should nevertheless

the less be violently attacked, then violence must be opposed against violence." Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension:—" If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to talk them out of their purpose if you can; and if you can't, you are to fight them out of it." That is the plain *English*, and, I presume, the plain *Swedish* of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon is already shewn in the affidavits which I have stated; that they were deliberately accepted, appears from their own instructions, which exactly tally with them. These instructions declare in express terms, " that all merchant-ships, during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats shew an intention of coming alongside, the merchant-ships are to sheer from them." It appears from the attestation that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act—an act common to all the parties concerned in it; and of which every part belongs to all; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

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This being the *actual* state of the fact, it is proper for me to examine, 2dly, what is there legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. In short, no man in the least degree conversant

versant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a *Swedish* commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of *England*, being neutral to *Sweden*, is authorised by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that

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that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, (as in some late instances they have agreed (a),) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorised speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of *Sweden* when it happens to be belligerent)

(a) It is made an article of treaty between *America* and *Holland*, as. 1782; Article 10. *Mart. Tr.* vol. ii. p. 255.

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give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent,) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In Book III. c. vii. sect. 114, he expresses himself thus: “On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer.

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mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents tems de se soumettre à cette visite, *aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.*" Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern *Europe*. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in *Europe*,—that a consummated refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated *French* Ordinance of 1681, now in force, Article 12, "*That every vessel shall be good prize in case of resistance and combat;*" and Valin, in his smaller Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the *resistance alone is sufficient* (a). He refers to the *Spanish* Ordinance 1718, evidently copied from it, in which it is expressed in the disjunctive, "*in case of resistance or combat.*" And recent instances are at hand and within view, in which it appears that *Spain* continues to act upon this principle. The first time in which it occurs to my notice

(a) In some of the treaties of *France* this article is expressly inserted in the disjunctive. *Tr.* between *France* and the *dutchy of Mecklenburg*, Art. 18, *an. 1779.* *Mart. Tr.* vol. ii. p. 40. also between *France* and *Hamburg*, *an. 1769.*

on the inquiries I have been able to make in the Institutes of our own Country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty (a), is in the Order of Council 1664, Article 12 (b), which directs, "That when any ship, met

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(a) " B. 7. Item se aucune nef ou vessel de la ditte flotte a congie et pouvoir de l'admiral de passer hors de la flotte entour aucun message ou autre besongne, s'ilz encontrent ou trouvent aucuns vesseaulx estranges sur la mer ou en ports des ennemys, adonques ceulz de nostre flotte doivent demander des maistres et gouverneurs de telz vesseaulx estrangers dont ilz sont et eulz bien examiner de leur charge ensemblement avecques leurs muniments et endentures, et s'il est trouve aucune chose de suspicion en telz vesseaulx que les biens sont aux ennemys, qui sont trouvez dedens les dits vesseaulx avec leurs maistres et gouverneurs ensemblement avecques les biens dedens icelle estants sauvement seront amenees devant l'admiral, et illecques s'il est trouve qu'ilz sont loyaulx marchants et amys sans suspicion de colerer, les biens seront a eulz redelivrees sans eulz rien dommager, autrement seront pris avec leurs biens et raenfonnez comme la loy de mer veult et demande.

" B. 8. Se aucunes de noz nefs ou vesseaulx encontrent sur la mer ou en ports aucuns autres vesseaulx, qui facent rebelletees ou defense contre ceulz de noz nefs ou vesseaulx, adonques bien lie a noz gents les autres comme Ennemys assaillir et par forte mayn les prendre et amener entierement, comme ilz les ont gaignez, devant l'admiral sans eulz piller ou endommager, illecques de prendre ce que loy et coutume de mer veult et demande, &c."

(b) During the struggle for naval superiority, which took place between the maritime states of *Europe*, about the middle of the seventeenth century, the pretension of resisting search by the protection of convoy, was put forward with much caution, and apparently for the first time, by *Christina* queen of *Sweden*, Aug. 16, 1653. Art. 4th, " They shall in all possible ways decline that they, or

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met withal by the Royal Navy or other ship commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize."—A similar

any of those that belong to them be searched. For seeing they are only sent to prevent all inconvenience and clandestine dealings, it is expected that they may be believed, and suffered to pass and proceed on their course unmolested, with all such things as are under their care."—It was restrained to neutral ports.—Art. 6th, " And more especially, for certain reasons, it is our command, that our own men of war *da chiefly, and in the beginning, steer their course to such ports as are neutral* in the *English and Dutch war*, till we give any farther directions on that account. However, without any hindrance to our own subjects, that intend to carry on their own free trade to *England* and *Holland without convoy*." *Thurloe's St. Papers*, vol. i. p. 424.

In 1655 it was taken up by *Holland*: " They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and their ships." *Ibid.* vol. iv. p. 203.

In May 1656 there happened an actual encounter on this subject between a fleet of merchantmen from *Cadiz*, (*Spain* being then at war with *England*,) under the convoy of *de Ruyter*, with seven men of war, and the commodore of some *English* frigates. " *Antwerp*. We have certain news of the arrival of *de Ruyter* in *Zyland* from *Cadiz*, from whence he brought stores of plate, mostly belonging to merchants of this city; he was met withal at sea by some *English* frigates, but finding themselves too weak they let him go." *Ib.* vol. iv. p. 740. See also the particular account of what passed, given by a *Dutch* officer to the *States General*: " That upon *de Ruyter* declaring that there was not any thing on board belonging to the king of *Spain*, they parted." *Ib.* vol. iv. p. 730. It appears, however, that the arrival occasioned great triumph in *Holland* and *Flanders*, and that the fleet was deeply laden with silver for the king of *Spain*, and the service of his armies in *Flanders*. " *De Ruyter* brought in his own ship, and

others

Similar article occurs in the Proclamation of 1672. I am aware, that in those orders and proclamations are to be found some articles not very consistent with the law

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others in his fleet, the sum of 20,000,000 (perhaps rials) of gold and silver, the greatest part for the king of Spain's use and the merchants of Brabant and Flanders." *Ibid.* vol. iv. p. 748. 732. The 12th article of the *Engl. Ord.* of 1664 might perhaps be pointed against these pretensions.

In another letter in the same collection, 21st Sept. 1657, from Nieuport the Dutch Ambassador in England.—We find the subject of convoy was strongly pressed at that time, and resisted on the part of this country: " respecting secret articles," concerning the visitation of ships which are convoyed under the flag of the state. I acquainted their Lordships, that of old all kings and states had made a difference between particular ships sailing upon their risques and adventures and between ships of the state and those which pass the sea under their flag and protection. That their High and Mighty Lords were of an opinion that it does strengthen the security of this state, that the ships of the state and officers should be responsible, as it were, for the ships sailing under their convoy; and that which I had proposed in my last memorandum concerning the same on behalf of their High and Mighty Lords was no new thing, but that plan had been most commonly proposed on all the treaties since the year 1651, in that manner that without regulating the same according to the said articles, the troubles at sea, whereof I had so often complained, could not be removed and prevented, and I alleged several examples. Upon which now one then the other of the said three Lords* replied, and did very much insist, that it could not consist with their security; that they could not nor ought to trust so much to particular captains at sea; that it would be an introduction and encouragement to disaffected persons to assist the enemy, and urged especially that in no former treaties any such articles were found, and that their High and Mighty Lords had no reason to

* *Turloe, Wolsey, Jones.*

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law of nations as understood now, or indeed at that time; for they are expressly censured by Lord *Clarendon* (a). But the article I refer to is not of those he re-

desire now any such novelty. I said that the practice on this side in regard of searching and visiting ships without difference was a new thing, and that the inhabitants of the United *Netherlands*, feeling the trouble and inconveniency of it, had reason to insist that it may be rectified by a good regulation." Vol. 6. p. 511. See also for the former conference, vol. 5. p. 663.

It appears that so many objections had arisen on the treaty proposed on the part of *Holland*; that it was found necessary to form an entirely new projet.—Vol. 6. Page 523. 558.

In a subsequent letter from the *Hague*, 30th Nov. 1657, it appears that the treaty broke off on this difference: "Le Sieur *Nienport* n'est pas encore ici arrivé, mais il écrit aussi d'avoir pris son congé. Il est fort croyable qu'il ne sera guère content d'avoir faillé à achever le traité de la marine; néanmoins, je m'imagine que la *Hollande* à présent ne seroit pas fort marry de ne l'avoir pas achevé, pour ne se pas oster la liberté de visiter des mêmes en cette guerre contre *Portugal*." *Turlos's St. Pap.* vol. 6. p. 622.

On the subject of search generally, without *any expressed reference* to convoy, there is this letter from *Cromwell* to General *Montague*: "The secretary hath communicated to us your letter of the 28th, by which you acquaint him with the directions you have given for the searching of a flushing and other *Dutch* ships, which (as you are informed,) have bullion and other goods aboard them belonging to the *Spaniard* the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the laws of nations and the particular treaties which are between this commonwealth and the United Provinces, and therefore we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein.

" *Hampton Court, 30th August, 1657.*"

(a) *Lord Clarendon's Life*, p. 242.

prehends;

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prehends; and it is observable that Sir *Robert Wiseman*, then the King's Advocate General, who reported upon the Articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying, that it was the rule, and the undisputed rule, of the *British Admiralty*. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorised to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the distinct authority of *Vattel*,—upon the Institutes of other great maritime countries, as well as those of our own country,—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, Whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

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The first ground of exemption stated on the part of the claimants is the treaty with *Sweden* 1661, article 12, and it was insisted by Dr. *Laurence*, that although the belligerent country is authorised by the treaty to exercise rights of enquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "*there is any other just and strong cause of suspicion*," then the ship is to undergo search (a). The treaty, therefore, recognises the rights

(a) It is said by Secretary *Tburloe*, in his conference with the Dutch ambassador, December 1656, "that the point of passes was very considerable to the state, and that the same was never agreed to in any treaty with any nation, but lately to *Sweden*." *Tb. St. P.* vol. 5. p. 663.—This seems to fix the date of their introduction in prize matters.

A similar reference to the certificate of foreign magistrates, with the same primary but inconclusive credit ascribed to them, appears to have been established in *Denmark* by *Frederic II.* in 1583, as a custom house regulation respecting the customs and Sund duties payable by foreign merchants—speaking of abuses, "we, not minding any longer to suffer the same, do therefore will that henceforth every man which uses his trade of merchandise and navigation through our custom towns and streams do cause a certain and just brief of all the laden merchandises and goods to be comprehended in the certificates which he is to take under the seal of *his magistrate*, and deliver the same to our customers, with this warning, that if any man arrive there without

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rights of inquiry and search, and the violation of those rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate: I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant-ships is not a *casus foederis* that is at all so provided for in the treaty: however, if it is a rule, it was complied with in the present instance, and the answer returned was, that "they were *Swedish* ships bound to various ports in the *Mediterranean*, laden with iron, hemp, pitch, and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers: the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so com-

without such true and just certificate, and any hindrance and inconvenience do happen unto him in that respect, the ship being searched, that then he impute the same unto himself, and not unto us or ours; and if upon cause of suspicion the ships should be searched, notwithstanding that a particular certificate had been delivered; and that in them more merchants' goods should be found than were comprehended in the certificates which were brought in, then not only those goods, but the whole ship and goods, as being forfeited, shall be confiscated and seized upon."

Promulgated 1583. *Rym. Fad.* vol. xvi. p. 347 352.

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posed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of *Europe* were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making *that* treaty which is the basis of it, I mean the treaty in which *Whitlock* was employed in the year 1656: for I conceive that *Valin* expresses the truth of this matter, when he says, p. 68. “*De droit ces choses*,” (speaking of naval stores,) “*sont de contrabande aujourd’hui et depuis le commencement de ce siècle, ce qui n’étoit pas autrefois néanmoins*;” and *Vattel*, the best recent writer upon these matters, explicitly admits amongst positive contraband, “*les bois et tout ce qui sert à la construction et à l’armament de vaisseaux de guerre*.” Upon this principle was founded the modern explanatory article of the *Danish* treaty, entered into in 1780, on the part of *Great Britain*, by a noble lord (a), then secretary of state, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that although it might be shewn that the nature of these commodities had been subject to some controversy in the time of *Whitlock*, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty and of the lat-

(a) The late Earl of *Mansfield*.

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ter treaty derived from it, yet that the exposition which the later judgment and practice of *Europe* has given upon this subject would in some degree affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in *Europe* had placed it. Certain it is, that in the year 1750 the Lords of Appeal in this country declared pitch and tar, the produce of *Sweden*, and on board a *Swedish* ship bound to a *French* port, to be contraband, and subject to confiscation, in the memorable case of the *Med Good's Hjelpe*. In the more modern understanding of this matter, goods of this nature being the produce of *Sweden*, and the actual property of *Swedes*, and conveyed by their own navigation, have been deemed, in *British* Courts of Admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly; another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even *those* which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty refers to, excited by the circumstances of such a number of vessels with such cargoes intended

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intended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection of an armed frigate associated with them for the very purpose of beating off by force all particular enquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced? Certainly not by the treaty itself; for the remedy for infraction is provided in compensations to be levied, and punishments to be inflicted upon delinquents by their own respective sovereigns. Article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorised by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause; a merchant vessel has not a right to say for itself, (and an armed vessel has not a right to say for it,) "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance, whether *it* is rightly detained, and to act upon that judgment to the extent of using force?—surely nothing but battle and bloodshed, as often as there is any thing like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing and putting

putting it upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences of this kind, where they have happened through accident or error ; and to redress, by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimants was, that the intention was never carried into act. And I agree with Dr. *Laurence*, that if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right. But how stands the fact in the present case ? The intention gives way, so far as it *does* give way, only to a superior force. It is for those who give such instructions to recollect, that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable ; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions, and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only

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only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences: if he meets with a superior force, he abandons his hostile purpose; if he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success;—and where you cannot, it is submission and striking your colours. Nothing can be more clear, upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, *fugit indignata*.

3. It is said that the papers were not immediately taken possession of nor proceedings instituted till long after the arrival in port. These are unquestionably irregularities; but I agree with the King's Advocate in maintaining, that they are not such irregularities as will destroy the Captor's right of Proceeding, for the Claimant had his remedy in the way of a Monition. How these delays were occasioned, whether in consequence of pending negotiations, (as has been repeatedly asserted in the course of the argument,) I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate,

frigate, the principal wrong-doer. On what grounds this was done—whether on that sort of comity and respect which is not unusually shewn to the immediate property of great and august Sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a re-delivery of her papers, the act of the Captors may perhaps furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for any thing that I know) that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honour and good faith of the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a Court of the Law of Nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish

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the right of maritime capture in war ; and to do this, how ? by the direct use of hostile force on the part of a Neutral State. It is high time that the legal merit of such a pretension should be disposed of one way or other—it has been for some few years past preparing in *Europe*—it is extremely fit that it should be brought to the test of a judicial decision : for a worse state of things cannot exist, than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilised nations, and a modern project of innovation utterly inconsistent with it ; and in my apprehension, not more inconsistent with it, than with the amity of neighbouring States, and the personal safety of their respective subjects.

The only remaining question which I have to consider is, the matter of expences ; and this I think myself bound to dispose of with as much tenderness as I can use in favour of individuals. It is to be observed, that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such persons—The authority of their country has been in some degree surprised in this matter—The Captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the Claimants are clearly entitled to have their expences charged upon the value of the property up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, and it is no answer to the Court to say that this gentleman or another gentleman did not think it adviseable to commit their private fortunes in the extent of the security required. It is the

the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expences for the further time in which orders could have been obtained from *Sweden*, and I fix this at the distance of two months from the order of further proof: and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country—and to foreign countries—with little diffidence in the rectitude of the judgment itself: I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

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Notice will be taken of the final decision, in appeal!, on this question, when it is determined, in some future Number.

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ERRATA to VOL. I.

Page 14. line 14. *for Zacharia read Zacharie*
4. *in marg. for Hazan and Earnest read Haafum
and Ernst*
28. — 4. *after although add a mixture of, and for effect
read affect*
52. — *antepenult, for 1692 read 1672.*
57. — 12. *for Court read Courts*
68. — 12 *for is read ate*
86. — *transpose Judgment, &c. to the top of the page*
141. — 15. *for treat read meet*

112. — 20. *for "ship as Dutch, read "ship sailed as
Dutch and*
223. — 18. *for owner read owners*
283. — 16. *for does not read does appear*
288. *note for estis read istis*
289. *marg. for or read on*
334. line 20. *for could read would*
343. — 3, 6. *read etenus, navi, constet*
347. — 6. *for when read and, and after that insert when
8. dele and*

STANDING INTERROGATORIES,

(L. S.)
GEORGE R.

*to be administered on behalf of Our Sovereign
Lord George the Third, by the Grace of
God, of Great Britain, France and Ireland,
King, Defender of the Faith. To all com-
manders, masters, officers, mariners and
other persons found on board any ships and
vessels, which have been, or shall be seized or
taken as prize by any of his Majesty's ships
or vessels of war, or by merchants' ships or
vessels, which have or shall have commissions
or letters of marque and reprisals, concerning
such captured ships, vessels, or any goods,
wares and merchandize on board the same,
examined as witnesses in preparatory, during
the present hostilities.*

LET each witness be interrogated to every of the following questions, and their answers to each interrogatory written down.

I. INTERROGATE. Where were you born, and where have you lived for these seven years last past? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been a subject, and of what cities or towns have you been admitted a burgher or freeman, and at what time and in what manner were you admitted a burgher or freeman, and at what time and in what manner were you so admitted? How long have you resided there since you were admitted a burgher or freeman, or where have you resided since? What did you pay for your admission? Are you a married man, and if married, where do your wife and family reside?

II. INTERROGATE. Were you present at the time of taking and seizing the ship or her lading, or any of the goods or merchandizes concerning which you are now examined? Had the

ship, concerning which you are now examined, any commission? What, and from whom?

III. INTERROGATE. In what place, latitude, or port, and in what year, month and day, was the ship and goods, concerning which you are now examined, taken and seized? Upon what pretence and for what reasons were they seized? Into what place or port were they carried, and under what colours did the said ship sail? What other colours had you on board, and for what reason had you such other colours? Was any resistance made at the time when the said ship was taken; and if yea, how many guns were fired, and by whom, and by what ship or ships were you taken? Was such vessel a ship of war, or a vessel acting without any commission, as you believe? Were any other, and what ships, in sight at the time of the capture?

IV. INTERROGATE. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of the said ship? Where did such master take possession of her, and at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode? If he has no fixed place of abode, then let him be asked, Where was his last place of abode, and where does he generally reside? How long has he lived there? Where was he born, and of whom is he now a subject? Is he married, if yea, where does his wife and family reside?

V. INTERROGATE. Of what tonnage or burthen is the ship which has been taken? What was the number of mariners, and of what country were the said seamen or mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

VI. INTERROGATE. Had you or any of the officers or mariners belonging to the ship or vessel concerning which you are now examined, any and what part, share, or interest in the said ship, or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said ship or vessel at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

VII. INTERROGATE. What is the name of the ship? How long hath she been so called? Do you know of any other name or names by which she hath been called? If yea, what were they? Had she any passport or sea-brief on board, and from whom? To what ports and places did she sail during her said voyage before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? Set forth the quality of every cargo the ship has carried to the time of her capture, and what ports such cargoes have been delivered at? From what parts and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture?

VIII. INTERROGATE. What lading did the said ship carry at the time of her first setting sail in her last voyage, and what particular sort of lading and goods had she on board at the time when she was taken? In what year and in what month was the same put on board? Set forth the different species of the lading and the quantities of each sort.

IX. INTERROGATE. Who were the owners of the ship or vessel, concerning which you are now examined, at the time when she was seized? How do you know that they were the owners of the said ship at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject?

X. INTERROGATE. Was any bill of sale made, and by whom, to the aforesaid owners of the said ship; and if any such was made, in what month and year? Where, and in the presence of what witnesses, was such bill of sale made? Was any and what engagement entered into concerning the purchase further than what appears upon the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what is become of it?

XI. INTERROGATE. Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

XII. INTERROGATE. What are the names of the respective laders or owners, or consignees, of the said goods? What country-

men are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any of the said consignees or laders any, and what interest, in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe, that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do and will belong to the same persons, and to none others?

XIII. INTERROGATE. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colourable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

XIV. INTERROGATE. Are there, in *Great Britain*, any bills of lading, invoices, letters or instruments, relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to this kingdom?

XV. INTERROGATE. Was there any charter-party signed for the voyage in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

XVI. INTERROGATE. What papers, bills of lading, letters, or other writings, were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burst, torn, thrown overboard, destroyed, or cancelled, concealed or attempted to be concealed, and when, and by whom, and who was then present?

XVII. INTERROGATE. Has the ship, concerning which you are now examined, been at any time, and when, seized as prize, and condemned as such? If yea, set forth into what port she was carried

carried, and by whom, and by what authority, or on what account she was condemned?

XVIII. INTERROGATE. Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such, your loss? Have you already received any indemnity, satisfaction, or promise, of satisfaction, for any part of the damage which you have sustained, or may sustain by this capture and detention, and when, and from whom?

XIX. INTERROGATE. Is the said ship or goods, or any, and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

XX. INTERROGATE. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

XXI. Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof?

XXII. INTERROGATE. Whether all the said cargo, or any and what part thereof, was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel, or ship, to another? From what, and to what shore, quay, boat, barque, vessel, or ship, and when and where was the same so done?

XXIII. INTERROGATE. Are there in any country, besides Great Britain, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers, or documents, relative to the said ship or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers, or documents, and what are the contents?

XXIV. INTERROGATE. Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever?

ever? And when, and by whom, and to whom, and in whose custody, possession, or power, do you believe the same now are?

XXV. INTERROGATE. Was bulk broken during the voyage in which you were taken, or since the capture of the said ship? And when, and where, by whom, and by whose orders? And for what purpose, and in what manner?

XXVI. INTERROGATE. Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers by name? Of what nation, rank, profession, or occupation? Had they any commission? For what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which, of the passengers any and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers, or mariners, secreted on board, and for what reason were they secreted? Were any of his *Britannic* Majesty's subjects on board, or secreted or confined at the time of the capture? How long and why?

XXVII. INTERROGATE. Were, and are, all the passports, sea briefs, charter-parties, bills of sale, invoices and papers, which were found on board entirely true and fair? Or are any of them false or colourable? Do you know of any matter or circumstance to affect their credit? By whom were the passports or sea-briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation of the persons therein described, or where they were delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long a time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pats or letters of safe conduct? If yea, from whom, and for what business?

XXVIII. INTERROGATE. If it should appear that there are in *Ireland*, or the *British-American* colonies, or in any other place or country, besides *Great Britain*, any bills of lading, invoices, instruments, or papers relative to the ship and goods, concerning which the witness is now examined; then interrogate, how were they brought into such place or country? In whose possession are they, and do they differ from any of the papers on board, or in *Great Britain*, or *Ireland*, or elsewhere, and in what particular do they differ? Have you written or signed any letters or papers, concerning the ship and her cargo? If yea, what was their purport? To whom were they written and sent, and what is become of them?

XXIX. INTERROGATE. Towards what port or place was the ship steering her course at the time of her being first pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship papers? Was the ship before, or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship papers? At what distance was she therefrom? Was her course altered at any, and what time, and to what other port or place, and for what reason?

XXX. INTERROGATE. By whom, and to whom hath the said ship been sold or transferred, and how often? At what time and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security, or securities, have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe in your conscience, such sale or transfer has been truly made? And not for the purpose of covering or concealing the real property? Do you verily believe that if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?

XXXI. INTERROGATE. What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other guns, mortars, howitzers, balls, shells, handgranades, muskets, carbines, fuzees, halberts, spontoons, swords, bayonets, locks for muskets,

flints, ram-rods, belts, cartridges, cartridge-boxes, pouches, gunpowder, salt-petre, nitre, camp equipage, military tools, uniforms, soldiers cloathing or accoutrements, or any sort of warlike or naval stores? Were any of such warlike or naval stores, or things, thrown over board, to prevent suspicion at the time of the capture? And were, and are any such warlike stores, before described, concealed on board under the name merchandize, or any other colourable appellation, in the ship papers? If yea, what are the marks on the casks, bails and packages, in which they were concealed? Are any of the before named articles, and which, for the sole use of any fortress or garrison in the port or place to which such ship was destined? Do you know, or have you heard of any ordinance, placart, or law existing, in such kingdom or state, forbidding the exportation of the same by private persons without licence? Were such warlike or naval stores put on board by any public authority? When and where were they put on board?

XXXII. INTERROGATE. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined, at the time of the capture?

ADDITIONAL INTERROGATORIES.

I. INTERROGATE. Did the said ship, on the voyage in which she was captured, or on, or during any, and what former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels? If yea, interrogate for what reason or purpose did she sail under such convoy? Of what force was or were such convoying ship or ships? And to what state or country did such ship or ships belong? What instructions or directions had you, or did you receive on each and every of such voyages, when under convoy, respecting your sailing or keeping in company with such armed or convoying ship or ships; and from whom did you receive such instructions or directions? Had you any and what instructions or directions, and from whom, for resisting or endeavouring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your ship's documents and papers? Or any and what other papers, that might be, or were

put

put on board your said ship ? If yea, interrogate particularly as to the tenor of such instructions, and all particulars relating thereto ? Let the witness be asked if he is in possession of such instructions, or copies thereof, and, if yea, let him be directed to leave the same with the examiner, to be annexed to his deposition.

II. INTERROGATE. Did the said ship, during the voyage in which she was captured, or on doing any and what former voyage or voyages, sail to or attempt to enter any port under blockade by the arms or forces of any, and which of the belligerent powers ? If yea, when did you first learn or hear of such port being so blockaded, and were you at any and what time, and by whom warned not to proceed to, or to attempt to enter such blockaded port ? What conversation or other communication passed thereon ? And what course did you pursue upon, and after, being so warned off ?



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